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ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

EASTERN DIVISION,
SEPTEMBER TERM, 1914

MIDDLE DIVISION,
DECEMBER TERM, 1914

WESTERN DIVISION,
APRIL TERM, 1915

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MIDDLE DIVISION.
F. T. FANCHER, Special Judge *

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

NASHVILLE, DECEMBER TERM, 1914.

(Continued from Vol. 131.)

**TENNESSEE CENTRAL RAILROAD COMPANY v. MRS. ARTIE
MORGAN.**

**TENNESSEE CENTRAL RAILROAD COMPANY v. CARL
MORGAN.**

**TENNESSEE CENTRAL RAILROAD COMPANY v. CLAUDE
MORGAN.**

(Nashville. December Term, 1914.)

1. TRIAL. Direction of Verdict. Evidence.

In passing on a motion for a peremptory instruction, the court must take the most favorable view of the evidence appearing from the record, supporting the rights asserted by the party against whom the motion is made. (*Post*, p. 4.)

* **Reporter's Note:** The opinion in these cases was sent to the West Publishing Company on April 25, 1915, and appeared in *Advance Sheets* of May 26, 1915, at page 1148, but was withdrawn for correction, and therefore was not published in 131 Tennessee, but is published now, as corrected, in this volume.

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(1)

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Case cited and distinguished: *Tyrus v. Railroad*, 114 Tenn., 579-594.

2. TRIAL. Taking case from jury. Question of law or fact. Conflicting evidence.

There can be no constitutional exercise of the power to direct a verdict in any case where there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried, but the case must go to the jury; but, if there is no such dispute, the question is one of law for the court. (*Post*, p. 12.)

Case cited and approved: *Railroad v. Scott*, 87 Tenn., 494.

Case cited and distinguished: *Railway v. Haynes*, 112 Tenn., 712.

3. RAILROADS. Accident at crossing. Question for jury.

In an action for the death of the husband of one of the plaintiffs and for personal injuries to the other plaintiffs, when their buggy was struck by defendant's engine, *held*, on the evidence, that whether defendant's trainmen were negligent in not keeping a lookout, and whether the engineer, after plaintiffs' peril had been discovered, took the right precautions against injury, were for the jury. (*Post*, p. 17.)

4. RAILROADS. Accident at crossing. Instructions. Negligence.

"An instruction that the situation of the locality as to obscuring the view of plaintiffs in the buggy or the trainmen on the engine, not caused by the default of either, was not the basis for a recovery or for liability, but that such situation and the rate of speed and the nearness of the engine to a train ahead of it were all to be considered in determining whether the statutory requirements had been complied with, and, if not, whether such failure was due to plaintiffs' sudden appearance on the track, so that defendant's servants had no time to comply therewith, was proper. (*Post*, p. 17.)

5. RAILROADS. Accident at crossing. Instructions. Contributory negligence.

An instruction that it was the duty of one crossing a railroad track to be mindful of trains and to look and listen, and, if

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necessary, stop, and to exercise that care and caution which a reasonably prudent person would exercise, under similar circumstances, to protect himself, was proper. (*Post*, p. 17.)

6. TRIAL. Instructions. Emphasizing particular facts.

Where the defendant's requests were so worded that they might have caused the jury to overlook its duty as to so sounding the whistle, if that could be done, the qualification of such instructions, so as to prevent the jury from overlooking such duty, if, under the circumstances, that was the best thing to do, and if the engineer had time to do so, was not objectionable as putting an undue emphasis on that feature of the case. (*Post*, p. 17.)

7. TRIAL. Infringement of jury trial. Withdrawal of evidence from jury. "Will." "Must." "Shall."

Where the jury believe that a witness has sworn falsely and corruptly in one material respect, they may disregard the evidence altogether, except in so far as it is corroborated by other credible evidence; but an instruction that "you 'will' reject his testimony altogether" was equivalent to "shall" or "must" and erroneous as withdrawing from the jury all the evidence which they might deem of the character indicated and denying the parties the constitutional right of trial by jury. (*Post*, p. 19.)

8. APPEAL AND ERROR. Harmless error. Instructions.

Such error was not harmless, within chapter 32 of the Acts of 1911, providing that no verdict shall be set aside or new trial granted for error in the charge or any error, unless it affirmatively appears that it has affected the result of the trial. (*Post*, p. 19.)

9. APPEAL AND ERROR. Assignment. Fundamental error.

Error, in an instruction as to the credibility of a witness testifying falsely in one material particular, equivalent to a withdrawal of evidence of such character, and to a deprivation of the constitutional right of trial by jury, *held* to make it the duty of the supreme court to consider it as if it had been properly assigned. (*Post*, p. 19.)

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10. WITNESSES. Impeachment.

In action for the death of plaintiff's husband and for injury to other plaintiffs from being struck by defendant's engine, where a witness for plaintiff testified that the defendant's fireman was a man of bad character when he lived in witness' neighborhood twelve or thirteen years before the trial, a letter written by the witness certifying that the fireman had been a quiet, peaceable boy was admissible to discredit the witness. (*Post*, p. 21.)

FROM WILSON.

Appeal from Circuit Court, Wilson County, to Court of Civil Appeals, and by *certiorari* from Court of Civil Appeals to Supreme Court.—JOHN E. RICHARDSON, Judge.

W. S. FAULKNER and W. R. CHAMBERS, for plaintiff.

J. M. ANDERSON, LILLARD THOMPSON and J. H. CAMPBELL, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

These cases were brought in the circuit court of Wilson county to recover damages of the Tennessee Central Railroad Company for the alleged wrongful death of William Morgan, the husband of Mrs. Artie Morgan and for injuries inflicted by the engine of the railroad company on Claude Morgan and Carl Morgan. The cases of the two latter were tried together; that of Mrs. Artie Morgan separately. A verdict was rendered in favor of Claude Morgan for \$3,000 and of

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Carl Morgan for \$2,000, but the former verdict was reduced on suggestion of the trial judge, so that judgment was rendered finally in favor of each of the two boys for \$2,000. Mrs. Artie Morgan, in her case, obtained a verdict of \$12,000, for which judgment was rendered. The cases were appealed to the court of civil appeals, and there all tried together, and a single opinion rendered by that court.

There was made in each of the cases in the trial court a motion for peremptory instructions by the railroad company, and there denied. The company assigned error in the court of civil appeals upon this action of the trial court, and that error was sustained, resulting in the dismissal of all of the cases by the court of civil appeals. All of the cases were then brought to this court by the writ of *certiorari*, and here the Morgans assigned error on the action of the court of civil appeals in sustaining the motion for peremptory instructions. The action of that learned court in so dismissing the suits is the first matter for our consideration.

We are of the opinion that that learned court committed error in dismissing these suits.

Of course, it is true that, in passing on a motion for peremptory instructions, the court must take the most favorable view of the evidence appearing in the record supporting the rights asserted by the party against whom the motion is made. Moreover, as said in *Tyrus v. Railroad*, 114 Tenn., 579-594, 86 S. W., 1074, 1077:

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“There can be no constitutional exercise of the power to direct a verdict in any case in which there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence, upon the issues to be tried. . . . That is, if there is any dispute as to any material fact, the case must go to the jury; if there is no dispute as to such facts, the question is one of law for the court. If the case is one triable by the jury, the court below may set aside the verdict, on motion for a new trial, if he deem the preponderance of the evidence to be against it. If he refuse to grant a new trial, and the case is brought to this court, and the decision here turns upon the facts, the judgment of the lower court will be permitted to stand, if there is any evidence in the record to support the verdict. If there is no evidence in the record to support the verdict, this court will, upon proper assignment to that effect, reverse the judgment, and remand the cause for a new trial. In the latter aspect of the matter, on motion properly made in the court below for a peremptory instruction, and an improper refusal of it by the trial judge, this court would be enabled to dispose of the case finally, and thereby save to the parties and to the governmental agencies of the State the delay and expense of an additional trial, in the absence of any reversible error in rulings upon evidence or otherwise.”

It will be seen, from the recital of facts which we shall presently make, that there is a considerable dispute in the evidence as to material facts, and likewise

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that it cannot be said there is no evidence to support the verdict.

On the day the injury occurred, there was a picnic for the employees of the railroad company at Hamilton Springs, a few miles west of Lebanon. A special train, composed of an engine and several coaches, conveyed the picnickers to their destination. There being no siding sufficiently long to hold the cars, the train was, after the passengers left it, run down to Lebanon. There the cars were left, and the engine was propelled back to Horn Springs, a short distance from Hamilton Springs, and there run upon a siding. Late in the afternoon, when it was nearly time to convey the picnic crowd back to their homes, the engineer, fireman, and a flagman, by the name of Blakeley, mounted the engine, ran it out upon the main track, and started eastward toward Lebanon to couple onto the coaches. Just before they had left the siding at Horn Springs, a regular train, known as the "Shopper," passed Horn Springs on its journey from Nashville to Lebanon and other points east of the latter city. When the engine got upon the main line at Horn Springs, the Shopper was just leaving Hamilton Springs, about a half a mile away. The engine gained upon the Shopper, and was in sight of it when the latter passed the country road where the accident occurred, which was about a half a mile, or such matter, from Hamilton Springs.

We shall now pause for a moment to note the movements of the Morgans. The three of them, William,

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Claude, and Carl, were in a buggy, driving along a country road that passed over the track of the railroad company at right angles. The railroad ran east and west; the country road north and south. The Morgans were on the south side of the railroad, and proceeding northward in a slow walk. When they got within thirty or forty feet of the track, they heard the Shopper coming, and stopped. When it passed, they proceeded on their journey. They drove down on the track, the horse had gotten across the rails, and the buggy was in the middle of the track, when the engine from Horn Springs dashed into them, killing William Morgan, and injuring Carl and Claude. The engine was running downgrade in its progress towards the road crossing, and made little noise; the exhaust not working. Having seen the Shopper go by, the Morgans expected no other train, but still, as a matter of caution, William Morgan looked both ways, but evidently saw nothing. He really could see nothing until he was within a few feet (himself, not the horse) of the track, because the country road at that point was in a cut four or five feet deep. On this cut there was a growth of grass, and there was a hedge, making the whole obstruction to vision fully twelve feet high. Moreover, there was a hedge running along the side of the track in the direction from which the engine was coming, and also a cornfield, with the corn some eight or ten feet high. It was therefore impossible for the Morgans to see the engine while they were in the cut, and the cut continued up to within six or eight feet

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of the track. It was equally impossible for any one on the engine to see these parties in the cut, or to see the horse. The first sight they would get of the horse from the engine would be as his head emerged from the cut into the open space of six or eight feet between the end of the cut and the track. The Morgans proceeded, as we have already stated, through this cut, and down upon the track, and had assumed the position we have described, the horse across the rails on the north side, and the buggy on the rails, when the engine bore down on them.

We shall now return to the engine and the servants of the company who manned it. These were the engineer, the fireman, and the flagman Blakeley. The engine was running backward towards Lebanon. Blakeley sat on the front end of the tender. The engineer was at his place, and the fireman at his. The flagman Blakeley says that he was looking steadily down the track in front; the engineer that he had his back to the boiler, with the lever and other appliances of the engine for controlling its movements, right at his hand, including the cord or rope to pull the whistle, and that he was looking steadily towards Blakeley, the flagman, on the front of the tender, to receive any signal he might make. The fireman did not testify in Mrs. Morgan's case, but in the other cases he testified that, at the time of the accident, he too, was on the lookout. Blakeley says that, when the engine had gotten within about forty feet of the mouth of the public road, he saw the ears of Morgan's horse, about forty

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feet from the track back in the road or cut, and that he at once gave the appropriate signal to the engineer to put down brakes and stop the engine, which was then running ten miles an hour, but that, before the engine could be stopped, the buggy was in the middle of the track, and the parties were run over. The fireman testifies in the Claude and Carl Morgan cases that, when he first saw the horse, his head was in the open space referred to, of six or eight feet between the cut and the track, and that then it was Blakeley gave the signal and the engineer put down brakes, and did all he could to stop the engine. The engineer likewise said that he saw the signal, and acted in the manner just stated, and did everything he could to stop the train and prevent the accident, except that he did not blow the whistle, and he did not have time to do that. So it is perceived, the persons upon the engine testify to the fact that they were alert and watchful, as the engine proceeded along the track towards the place of the accident. At this point, however, a grave contradiction arises. Three witnesses for the Morgans testify that, as the engine passed Hamilton Springs, the persons on it were waving their hands toward the picnickers, who lined the track or were scattered down the track a considerable distance along from Hamilton Springs toward the cut. One of these witnesses testified that the waving continued until he took his eyes from them, and the engine had then reached a culvert west of the public road; but the railroad company's witnesses testify that this culvert was 487 feet

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from the road crossing, and that from that point, at least, they were instant in their duty. However, one of the witnesses for the Morgans testified that he watched them, and that they were still waving when they got very near to the crossing. The three men on the engine testify that there was no waving done, except by the fireman, and this for only a short distance. Blakeley admits that he did wave his hand one time at a person who greeted him from the side of the road, but says he did not take his eyes from the track. The engineer does not admit that he waved at all. So here is an important conflict in the evidence. If these men were waving their hands, and looking back at the picnickers, as they passed by, they were, of course, guilty of a great breach of duty, since they could not be on the lookout for obstructions. If they were so waving and looking back, there was ground for the jury to infer that they did not see the obstruction as soon as it could have been seen.

Then, again, there was ground for grave adverse inference on the part of the jury, based on the statement of Blakeley that he saw the horse's ears when he was forty feet back in the cut, and that the horse got on the track before the engine could traverse the same distance, running at ten miles an hour, when the horse was going along slowly, as testified to by Claude Morgan. There was also ground for grave inference on the part of the jury from the fact that, if Blakeley had been properly watching, he could have seen the horse's head when it got in the open space six or

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eight feet from the track, and that the engineer did not then whistle and warn the driver to pull his horse in.

It is to be noted in the Claude and Carl Morgan cases that the fireman testified, as we have already stated, that he saw the horse's head in the open space referred to, and it was then the signal was given to put down brakes, and reverse the engine; but it must be remembered that there was also evidence in those cases that the fireman had stated, in the presence of witnesses at the trial, that if they (meaning himself and the other persons on the engine), had been attending to their business, and had not been looking back and waving, the accident would not have happened, and he was sorry.

Furthermore, we think it most probable that if the engineer had warned the Morgans by whistle, when the horse's head appeared at the track, within striking distance, the accident would never have happened, because his driver, in all probability, would have hastily pulled him back, as he was a gentle horse, and easily managed.

In this connection it is proper to say that it is within the province of the jury to say whether the engineer did the right thing when the occasion arose. It may be if the engine had been running front foremost instead of backwards, and the engineer had himself made choice of signals on seeing the obstruction, he would have blown the whistle, and thus saved the accident; but, as it was, he was dependent on Blakeley, the flagman, sitting on the tender, to look out for him,

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and to give him proper signals. Blakeley chose the signal, and that was to put down brakes and reverse the engine. If there was not time to do everything the statute requires, the engineer must do the most important thing which the occasion may dictate. Evidently that most important thing, under the circumstances, was to sound the whistle. It was so held in the case of *Railroad v. Scott*, 87 Tenn., 494, 11 S. W., 317. We are not to be understood as deciding this point authoritatively at this time. All we mean to say is that there was evidence from which the jury might have so concluded. In respect of the inference that may be drawn from the facts occurring at and immediately before an accident, we should now refer to *Railway v. Haynes*, 112 Tenn., 712, 81 S. W., 374. That was a case in which the court had under consideration a street railway accident; but it is to be noted that the common law imposes upon such corporations practically the same duties as our statutes impose upon commercial railways. It was said on page 726 *et seq.*, of 112 Tenn., on page 377 of 81 S. W.:

“The error complained of is to be found in the following language appearing in the first excerpt above quoted:

“ ‘Or that he failed, when danger became imminent, to apply the brake and sound the gong or bell, or give other signal, and use every means in his power to stop the car and prevent an accident.’

“It is said that the rule thus laid down would impose upon the motorman the performance of duties

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which were practically impossible of accomplishment; that by this rule he is required to sound his gong, give other signal, to apply his brake, and to use every means in his power to stop his car; and that this would make the motorman capable of reversing with one hand, of winding the brake with the other, and at the same time stamping his gong to warn the person who had thrust himself or fallen into danger. We have no statute declaring that the special acts referred to by the circuit judge, or any other special act, should be performed by the servants of the company. The question, then, is one at large, to be determined upon general considerations drawn from the nature of the particular business, and the habits and the customs of the people whom it serves. Street cars are designed to ply their business upon public streets—many of the streets densely crowded. People in vehicles and on foot must be constantly encountered, going in both directions, with the course of the car and in the opposite course, and most generally in the hurry of business. In other words, the car may at any time have to pursue its way through the throng of a city's business. Under such circumstances, and even when the streets are not crowded, a mishap may at any moment occur, and may come in a manner which no man can accurately forecast in all its details. The person propelling the car should be left free to choose the best means of preventing the accident at the time, and as the situation is then presented to him. The means at hand for preventing the collision are the sounding of the

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gong for the purpose of warning the person about to be collided with, in order that he may save himself, the putting on of brakes, and the application of the reverse lever. In some situations the sounding of the gong may be the means which the occasion requires as the best means for the prevention of the accident; in others it may be best to apply the brake; in others the reverse lever. Sometimes it may be reasonably within the power of the motorman to put in use two of these means, and sometimes perhaps, all of them; sometimes only one of them; and, under some circumstances, we may well assume, it would be best that he should attempt only one of the means provided, as being the most efficient, time lacking to use the others, or even to attempt their use. Subsequently, when his conduct is displayed in the evidence for examination before a court and jury, it is not for the judge to say that, under the circumstances surrounding and attending the accident detailed, he should have done this or that particular thing; but on the contrary, when all of the circumstances are shown, and it is made to appear what he did at the time for the prevention of the accident, it is for the jury to say whether he did all that he could do (that is, all that a man of ordinary intelligence and prudence and of reasonable alertness could have done under the special circumstances proven) to stop the car and prevent the accident. An instruction that the motorman should do some special thing is an invasion of the province of the jury by the circuit judge."

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So it is that the jury must judge, under all of the facts proven, whether the engineer did the best that he could do, under the circumstances, to prevent the accident. We think that we have said enough to show that there was at least a reasonable ground for a difference of opinion upon the subject, and that there should have been no peremptory instruction, forbidding the jury to express their opinion on the facts.

We may add that the facts already recited show there was reasonable ground for a difference of opinion as to what the real facts were, arising out of important conflicts in the testimony, and attacks made upon the credibility of one or more witnesses.

The learned court of civil appeals, after holding that the trial judge should have given peremptory instructions, very properly passed upon other errors assigned in view of the possibility that this court might have a different view as to the propriety of directing a verdict.

The disposition of the matter of peremptory instructions disposes of the first, second, and third assignments made in the court of civil appeals. No question is made here as to the action of the court of civil appeals on the fourth, fifth, and sixth assignments made in that court.

The learned court of civil appeals sustained the seventh assignment made in that court. This assignment complained of the following instruction contained in the charge of the trial judge, viz.:

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“The situation of the premises as to obscuring the view of the party in the buggy or those on the locomotive, when not caused by the default of either, is not the basis for recovery, or basis for relief of liability, but such situation, and also the question of rate of speed and proximity of the locomotive to a foregoing train, are all to be considered by you in helping you to determine just what occurred or what did not occur, and helping you to decide the determinative question, which is this: Were the statutory requirements complied with, and, if not, was the failure to comply due to such sudden and immediate appearance upon the road that defendant’s agents and servants had not time to comply with them, as I have explained the matter to you?”

We see no objection to this instruction.

The learned court of civil appeals overruled the eighth assignment, and no question is here made of its action in that regard.

That court sustained the ninth assignment. That assignment complained of the following instruction given by the honorable trial judge:

“In order to help you determine whether and to what extent there was any such contributory negligence, I charge you that it is the duty of persons about to cross over railroad tracks to be mindful of the fact that trains do run and pass upon such tracks; and hence it is their duty, generally, to look and listen for an approaching or passing train, and, if necessary, in order that they may be in the use and employment

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of ordinary care, to stop. Their duty is both to look and listen to the extent of freeing themselves from negligence, and, the less opportunity there is to do one of them, the greater the necessity to do the other. How far he is to go in exercising his faculties of looking and listening is a question for the jury to determine under all of the evidence relating to the situation and condition of the premises, as to obscuring of the view, proximity of the locomotive in question to a foregoing train, or preceding train, and the other facts and circumstances in the case; the rule being this: One must take notice that trains move upon the track, and must exercise such reasonable care and caution, as a reasonably prudent man would employ or use under similar circumstances, to protect him from harm or injury.”

We see no objection to this instruction, and think the learned court of civil appeals was in error in its holding in respect thereto.

The court of civil appeals, after disposing of the assignment just mentioned, passed to assignments numbers 11 and 12, in the case of Mrs. Artie Morgan. These assignments were based upon the action of the trial judge in adding a certain qualification to each of two instructions offered by the railway company and charged by him to the jury. The qualification in each instance was properly designed to prevent the jury from misunderstanding the charges offered to the extent of overlooking the duty of the railway company to sound the whistle, if under all the circumstances, as

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they occurred at the time, that was the best thing to do, and if the engineer had time to sound the whistle. We think there was no error in adding this qualification. The requests were so worded, we think, as that they would have resulted, or might have resulted, in causing the jury to overlook the duty as to sounding the whistle, if that could be performed. It is insisted by learned counsel for the railway company that the thought embraced in the qualification made by the trial judge was already implied in the language of each request, which called the attention of the jury to the duty of the railway company to do everything that it could do to prevent an accident when an obstruction appeared in front of the moving train. Certainly it was so implied, and, if so, there was no objection, or could be no reasonable objection to plainly expressing such implication. We do not think that it resulted in an undue emphasis on this special feature of the case, as insisted in the briefs of learned counsel.

After disposing of these matters, the learned court of civil appeals addressed itself to an assignment which complained of the following language appearing in the charge of the trial judge in each of the cases:

“If a witness be shown to have sworn willfully, falsely, and corruptly in one material respect, you will reject his testimony altogether, except in so far as it is corroborated by other credible evidence.”

The court of civil appeals sustained this assignment, and we think they acted correctly in so doing. The word “will” was equivalent to “shall” or “must,”

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as used in the excerpt quoted, and was equivalent to withdrawing from the jury all of the evidence which they might deem of the character indicated. This was clear error. It is true that, where the jury believe that a witness has sworn in the manner indicated in the excerpt, they may, or are at liberty to, disregard the evidence altogether, except in so far as it is corroborated by other credible evidence. The great weight of authority so states the rule. The jury should not be told that they must disregard such evidence. This was equivalent to denying the parties the constitutional right of a trial by jury, or, which is tantamount to the same thing, to not permitting their evidence to be considered by the jury. It appears in the charge of the trial judge in all the cases. It is true that this error seems not to have been formally assigned in the Artie Morgan case, but only in that of Claude and Carl Morgan; still all the cases were heard together in the court of civil appeals, and the error was there considered, and it is of so great a character, in deprivation of constitutional right, that it is the duty of the court, in furtherance of justice, to consider the error as if it were assigned in both cases, the matter appearing in both, and pertinent to both. We do not think that chapter 32 of the Acts of 1911 would apply to such deprivation of constitutional right. Of course, we cannot say as to which one of the witnesses the jury may have thought that the charge was applicable. But we do know, as shown by the record, that very strong attacks were made by the plaintiffs

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below on the evidence of the engineer, the fireman, and the flagman Blakeley, the vital witnesses on the part of the railway company. These attacks were made as to the engineer and Blakeley, and, indeed, as to the fireman, through the agency of conflicting evidence, and by stringent cross-examination. Furthermore, as to the fireman, there was a direct attack made by showing, through certain witnesses, that he had made out of court statements different from those made in court. There were also witnesses introduced directly attacking his character.

For the error committed in giving the erroneous instruction just mentioned, all of the cases must be reversed and remanded for a new trial.

There is one more error, one occurring alone in the Claude and Carl Morgan cases which should be noticed, before we close this opinion. It is this:

The witness Christian was introduced by plaintiffs below, and testified in effect that the fireman was a young man of bad character when he lived in the witness's neighborhood twelve or thirteen years before the trial occurred. Mr. Christian was confronted with the following letter:

“Wilford, Wilson County, Tennessee.

November 10, 1902.

“To Whom it May Concern: I have known Robert Ward all of his life, and found him to be a hard working boy, and the best thing I can say is that he helped buy his widowed mother a home, and she now lives on it in a mile of me. I never knew anything wrong

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with him. I always considered him a peaceable and quiet boy.

Very respectfully,
S. P. CHRISTIAN, J. P.”

Mr. Christian admitted writing this letter, but the trial judge would not permit it to be read to the jury. The learned court of civil appeals rightly held that this was error. Certainly it was proper matter to be used in cross-examination of the witness Christian, since it tended very strongly to discredit the testimony then given by him as to the character and reputation of the fireman, Robert Ward, when he lived in Christian's neighborhood.

As already indicated, for the errors above mentioned and sustained, the judgments must be reversed, and the causes remanded for a new trial. The plaintiffs below will pay the cost of the appeals in these cases.

Boyd v. Bottling Works.

BOYD *et ux.* v. COCA COLA BOTTLING WORKS.**(Nashville. December Term, 1914.)****1. FOOD. Bottling of tonic. Negligence. Pleading and proof. Variance.**

In an action against a bottling company for injuries from drinking a tonic negligently placed in a bottle containing a cigar stub, there was no fatal variance between an allegation of the declaration that defendant negligently placed the cigar stub in the bottle, and the proof that it was placed in the bottle by some one else, and was there when the bottle was filled, where the real negligence charged in the declaration was the bottling of the cigar stub and placing of the bottle on the market. (*Post*, p. 26.)

2. FOOD. Poisonous substances. Contributory negligence.

A consumer was not negligent for failure to examine a bottle of tonic for poisonous substances, where it was sealed when bought from the dealer to whom the bottling works had sold it, especially where the bottle and the fluid were both dark in color, and the poisonous substance, a cigar stub, could not have been readily discerned. (*Post*, p. 26.)

3. FOOD. Poisonous substances. Liability of Manufacturer to Consumer.

In an action for injuries from drinking a tonic containing a poisonous substance, the bottle containing same having been bought sealed from an intermediate dealer to whom the defendant manufacturer had sold it, want of contract or privity between defendant and the person injured constituted no defense; a person who undertakes to perform an act which, if not done with care and skill, will imperil the lives of others, being liable to others suffering from his negligence. (*Post*, p. 27.)

Cases cited and approved: *Thomas v. Winchester*, 6 N. Y., 397; *Blood Balm Co. v. Cooper*, 83 Ga., 457; *Watson v. Augusta Brew-*

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ing Co., 124 Ga., 121; Salmon v. Libby, 219 Ill., 421; Bishop v. Weber, 139 Mass., 411; Mazetti v. Armour & Co., 48 L. R. A. (N. S.), 213.

Cases cited and distinguished: Burkett v. Mfg. Co., 126 Tenn., 467; Tomlinson v. Armour & Co., 75 N. J. L., 748, 19 L. R. A. (N. S.), 923.

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
G. N. TILLMAN, Judge.

TURNEY & TURNEY and B. A. BUTLER, for plaintiffs.

CHERRY & STEGER and McALLISTER, SMITH & McALLISTER, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

This damage suit was instituted by W. C. Boyd and wife, Lou J. Boyd, and pending the suit Mrs. Boyd died. W. C. Boyd was appointed her administrator, and the case was revived.

A motion for a directed verdict in favor of defendant below was sustained by the trial court. Upon appeal this judgment was reversed by the court of civil appeals, and the case is before us on petition for *certiorari*, which has been granted.

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Mrs. Lou Boyd was a lady in delicate health who was in the habit of occasionally drinking coca cola as a tonic and for its invigorating effects. Her husband bought for her a sealed bottle of this beverage from a retail dealer in Nashville. He carried the bottle home and poured a portion of its contents into a glass. His wife drank the liquid poured out, and immediately became intensely nauseated and suffered seriously from its effects.

Mr. Boyd examined the bottle and found therein a cigar stub about two inches long which had apparently been in the liquid for some time. It was shown on the trial that complaint was made by Mr. Boyd to an agent of the Coca Cola Bottling Works about the incident referred to, and this agent expressed regret and indignation and said that the company had employed some negroes who were careless about washing bottles into which coca cola was poured. The proof shows that it was the custom of defendant company to buy empty bottles around town and refill them. A physician testified for plaintiff below as to the poisonous effect of a fluid impregnated with nicotine from a cigar stub.

Defendant below introduced no proof, but made a motion for peremptory instructions, which was sustained on the ground that there was no privity of contract between the Boyds and the Coca Cola Bottling Works, inasmuch as the purchase was made from an intermediate dealer.

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Before considering this proposition, there are some minor matters of which we should dispose.

It is first urged on behalf of the bottling works that there was a fatal variance between the declaration and the proof, in that the declaration charged defendants below with negligently placing the cigar stub in the bottle, while the proof tended to show that the cigar stub was placed in the bottle by some one else and was in the bottle when it was filled. The charge of the declaration is that the cigar stub "was placed in such bottle and sealed up with said fluid by defendant company, its agents and employees, and had been negligently placed upon the market for sale and for use as aforesaid." The real negligence charged in this declaration is the sealing up of the cigar stub in the bottle and the placing of such bottle on the market. It is immaterial as to who put the stub in the bottle, and a variance between the declaration and the proof in an immaterial matter does not affect the case.

It is next said that the plaintiffs below were guilty of contributory negligence in not examining more closely the bottle and its contents. We think there is nothing in this. The proof shows that the bottle and the fluid were both of a dark color, and the cigar stub could not be readily discerned. Furthermore, it is to be presumed that the contents of sealed packages put on the market to be used as a food or beverage are fit to be so used. A consumer is not negligent in failing to examine the same for poisonous substances.

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There are some other matters mentioned in the brief filed for the bottling works which we do not think it necessary to discuss, and we come to the main question in the case.

The trial judge doubtless based his action on the case of *Burkett v. Mfg. Company*, 126 Tenn., 467, 150 S. W., 421, and this case is pressed upon the court by counsel for defendant company as being conclusive of this controversy.

Burkett v. Mfg. Company, supra, was a case in which the purchaser of a carriage, which had been bought from a dealer, sued the manufacturer for injuries sustained by reason of the spokes in one of the wheels breaking. It was held by this court that the manufacturer was not liable to the purchaser. The court said:

“The general rule is that a manufacturer is not liable to a third person, who buys his goods from an intermediate dealer, because of the want of any privity between the parties. The rule is different, however, if the manufacturer had knowledge of the defect, and put the article upon the market in that condition. In such case he is guilty of fraud, and is liable to any one into whose hands the article falls, and who is injured while using it properly. He is also liable to such third person, where the article sold is of such kind as to be imminently dangerous to human life or health; also, when an article, although not apparently dangerous, is known by him to be such, and he gives no notice of its qualities when he put it upon

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the market.” *Burkett v. Manufacturing Co.*, 126 Tenn., 472, 150 S. W. 421.

We do not think the foregoing case sustains the action of the court below. The present case falls within the second exception stated in *Burkett v. Mfg. Co.* All medicines, foods, and beverages are articles of such kind as to be imminently dangerous to human life or health unless care is exercised in their preparation.

Upon a person who undertakes the performance of an act, which if not done with care and skill will imperil the lives of others, the law imposes the duty of exercising the requisite care and skill. In such matters such a person is liable to others suffering from his negligence.

This liability does not depend on contract or privity, but arises from a breach of the legal duty, to which we have just referred. A tort is committed, a legal right invaded, by practices which prejudice another's health.

Speaking in a case similar to this one, the New Jersey Court of Errors and Appeals said:

“Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including ‘the preservation of a man's health from such practices as may prejudice or annoy.’” First Blackstone's Comm., 129, 134. . . . To assert therefore that one living in a state of society organized, as ours is, according to the principles of the common law, need not be careful that his acts do not endanger the life or impair the health of his neighbor, seems to offend against the

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fundamentals.” *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl., 314, 19 L. R. A. (N. S.), 923.

Upon the principles stated, a negligent manufacturer has been held liable for injuries to consumers, purchasing from intermediate dealers, for the careless labeling of poisons and patent medicines. *Thomas v. Winchester*, 6 N. Y., 397, 57 Am. Dec., 455; *Blood Balm Co. v. Cooper*, 83 Ga., 457, 10 S. E., 118, 5 L. R. A., 612, 20 Am. St. Rep., 324. For negligently bottling beer with broken glass in the bottle. *Watson v. Augusta Brewing Co.*, 124 Ga., 121, 52 S. E., 152, 1 L. R. A. (N. S.), 1178, 110 Am. St. Rep., 157. For negligent preparation of mincemeat put up in a package. *Salmon v. Libby*, 219 Ill., 421, 76 N. E., 573. For the careless and negligent canning of spoiled meat. *Tomlinson v. Armour & Co.*, 75 N. J. L., 748, 70 Atl., 314, 19 L. R. A. (N. S.), 923. See, also, *Bishop v. Weber*, 139 Mass., 411, 1 N. E., 154, 52 Am. Rep., 715.

So when the manufacturer of this beverage undertook to place it on the market in sealed bottles, intending it to be purchased and taken into the human stomach, under such circumstances that neither the dealer nor the consumer had opportunity for knowledge of its contents, he likewise assumed the duty of exercising care to see that there was nothing unwholesome or injurious contained in said bottles. For a negligent breach of this duty, the manufacturer became liable to the person damaged thereby.

Practically all the modern cases are to the effect that the ultimate consumer of foods, medicines, or bev-

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erages may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles. This is certainly true where the articles are sold in sealed packages and are not subject to inspection. Some of the cases place the liability on the grounds heretofore stated. Others place it on pure food statutes. Others say there is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use, and another case says that the liability rests upon the demands of social justice. See the cases collected in a note to *Mazetti v. Armour & Co.*, 48 L. R. A. (N. S.), 213, 219, and in a note to *Tomlinson v. Armour & Co.*, 19 L. R. A. (N. S.), 923:

Upon whatever ground the liability of such a manufacturer to the ultimate consumer is placed, the result is eminently satisfactory, conducive to the public welfare, and one which we approve.

The judgment of the court of civil appeals is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1915.

*CROSS et al. v. FISHER et al.**

(Jackson. April Term, 1915.)

**1. SCHOOLS AND SCHOOL DISTRICTS. Consolidation of schools.
Discretion of officers. Statute.**

Under Acts 1913, ch. 4, providing generally for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, the consolidation of schools is not required, but is merely permitted, and the question how the law shall be administered in such respect is left to the discretion of the county board of education. (*Post*, p. 39.)

Acts cited and construed: Acts 1913, ch. 4, 23, sec. 2; Acts 1873, ch. 25; Acts 1891, ch. 132; Acts 1907, ch. 236, sec. 10, subsec. 4; Acts 1909, ch. 264, sec. 3.

Constitution cited and construed: Art. 2, sec. 17; Art. 11, secs. 8, 12.

Case cited and approved: *Leeper v. State*, 103 Tenn., 500.

*For cases passing upon duty of public to furnish free transportation to pupils, see note in 37 L. R. A. (N. S.), 1110.

As to the right to use school money to transportation of pupils, see note in 38 L. R. A. (N. S.), 710.

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2. SCHOOLS AND SCHOOL DISTRICTS. Transportation of pupils. Statute. Constitutionality.

Acts 1913, ch. 4, sec. 2, providing for the transportation of children residing too far from a school to attend otherwise, if there are enough children so situated, though vesting a discretion in school boards to discriminate reasonably between pupils living in sufficient numbers at a distance from a school to need transportation, and those so living in insufficient numbers, is not violative of Const. art. 11, sec. 12, setting apart the interest on the common school fund for the equal benefit of all the people, since such section must be construed with section 8 of the same article, providing that the legislature shall not pass any law for the benefit of individuals inconsistent with the general law of the land, nor any law granting to any individual rights or exemptions other than such as may be extended by the same law to any member of the community who can bring himself within the law, for while, by necessity, children of some citizens resident at a distance from the schools may be deprived of the transportation extended to others, nevertheless such citizens can bring themselves within the law by changing residence. (*Post*, p. 39.)

Acts cited and construed: Acts 1913, ch. 4.

Constitution cited and construed: Art. 11, secs. 8, 12.

Case cited and approved: *Fogg v. Board of Education*, 76 N. H., 296.

Case cited and distinguished: *Carey v. Thompson*, 66 Vt., 665.

3. SCHOOLS AND SCHOOL DISTRICTS. Consolidation of schools. Discretion of board. Abuse. Remedy.

If a county board of education, acting under Acts 1913, ch. 4, providing for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, in consolidating certain schools into one had ignored all reasonable rules, acting in an arbitrary manner, so as to abuse its discretion, by disregarding the wishes, welfare, and interests of the taxpayers of the district, the action of the officials would have been proper subject for correction by injunction because of abuse of power. (*Post*, p. 44.)

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4. SCHOOLS AND SCHOOL DISTRICTS. Officers. Constitutional and statutory provisions. "County officers." "Employee."

Acts 1913, ch. 4, sec. 3, giving boards of education authority to employ supervisors of schools, whose duty shall be to assist county superintendents in the organization, gradation, and supervision of schools, etc., and to pay them out of the respective school funds of counties, etc., does not violate Const., art. 11, sec. 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county courts, since the appointees contemplated by the act are not "county officers," but mere "employees." (*Post*, p. 45.)

Constitution cited and construed: Art. 11, sec. 17.

Case cited and approved: *Prescott v. Duncan*, 126 Tenn., 106.

FROM WEAKLEY.

Appeal from the Chancery Court of Weakley County
—COLIN P. MCKINNEY, Chancellor.

MAIDEN & MAIDEN, for appellants.

LEWIS & GARRETT and H. H. BARR, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The bill in this cause was filed by certain citizens, taxpayers, and patrons of the schools in the nineteenth civil district of Weakley county. The defendant Syl Fisher is the county superintendent of public instruction, and the other defendants are members of the county board of education of said county. The bill attacks the validity of chapter 4 of the Acts of the

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regular session of the Tennessee legislature of 1913, charging that it violates certain provisions of the State constitution. The act in question is as follows:

“An act to be entitled ‘An act to improve the public school system of the State by authorizing boards of education to consolidate schools, provide for the public transportation of pupils, and to employ supervisors.’

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that whenever it shall appear to the county board of education, or the county high school board of education, in any county of the State, that the efficiency of the public schools would be improved thereby, said boards of education shall have full power, and are hereby granted authority, to consolidate two or more schools.

“Sec. 2. Be it further enacted, that whenever, by reason of such consolidation, a sufficient number of children is situated too far away from such schools to attend without transportation, said boards of education are hereby authorized and empowered to make provisions for the transportation of said pupils that reside too far away from said schools to attend without transportation, and to pay for same out of the respective public school funds of the county in which such children reside.

“Sec. 3. Be it further enacted, that said boards of education are hereby given authority to employ supervisors of schools, whose duties shall be to assist county superintendents of public instruction in the organiza-

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tion, gradation, and supervision of public schools of the county, and the organization of industrial work, and to pay for same out of the respective public school funds of the county: Provided, that such supervisors shall be persons of known ability to supervise the work of other teachers, and shall have the equivalent of a high school education: Provided, further, that supervisors of elementary schools shall hold an elementary certificate of the first grade, and supervisors of high schools shall hold a high school certificate of the first grade.

“Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with this act be, and the same are, hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it.”

The bill in substance charges that the defendants pursuant to said act had abolished the four public schools of said district, known as the Hopewell School, Parish School, Chestnut Grove School and the Galloway School, and had ordered a consolidation of said schools into one central school, to be located at or near the Hopewell School, where said board intended to construct a large school building at public expense; that the board was proposing to furnish transportation for the children belonging to said district schools who lived too far away from the central school to attend otherwise. It further charged that this consolidation was detrimental to the interests of the patrons and children of the schools because of the fact that a number would be removed a considerable distance

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from the school, and that the action of the board was arbitrary and an abuse of power.

The act of 1913 was attacked as violative of the following sections and articles of the State constitution:

(a) Section 12, article 11, of the constitution, because it is alleged that said act authorizes the destruction of equal benefits guaranteed to all the people by said section of the constitution.

(b) Section 8, article 11 of the constitution, because it is alleged that benefits and privileges are conferred upon certain children and patrons which are or may be withheld from certain children and certain patrons; that it confers special rights, privileges, and immunities on some, and withholds such rights and privileges from others.

(c) Section 17, article 2, which ordains that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.

(d) That said act is void and unconstitutional for the reason that it undertakes to delegate legislative power to the county board of education.

(e) That said act is void for uncertainty and vagueness, in that it does not provide for the transportation of all children who reside too far away from the consolidated schools to attend, but only makes provision for transportation in case where the numbers so residing too far away to attend said schools are sufficient.

The decree of the chancellor holds that the said chapter 4 of the Acts of 1913, is a valid and constitutional statute.

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The decree recites that the complainants, by written agreement filed in the cause and by statement of their solicitors at the bar of the court, admitted that the facts did not warrant complainants' relief on the ground that the abolition and consolidation of said schools and providing of transportation was arbitrary, capricious, and an abuse of power; the court decreeing upon said agreement that the action of the said board was within its jurisdiction and power, and not arbitrary, capricious, and an abuse of power.

The decree orders the dismissal of the bill, taxing complainants with the costs, from which the complainants appealed to this court.

The decree itself provides that only certain parts of the record shall be copied in the transcript, "it being admitted that there was sufficient evidence to sustain the decree as to facts."

The first assignment of error is subdivided. Subdivision A thereof attacks the act of 1913 on the ground that it violates section 12, article 11, of the constitution. This is the portion of our constitution applying to our system of public schools and the fund called the common school fund, and provides that the interest from this school fund shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof.

Subdivision B under the first assignment attacks the act of 1913 on the ground that it violates section 8, article 11, of the constitution, which provides against

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granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law, and against the passage of any law for the benefit of individuals inconsistent with the general laws of the land.

The insistence in the present case is that the consolidation of these schools will work a hardship on some of the patrons so far removed that is not common to others, and that it will confer benefits upon some to the exclusion of others. It may be here stated that any location of schools will necessarily bring about the benefit of close proximity to the schools of some patrons which it would be impossible in any practical sense to confer upon others in the same degree. There is no such thing as absolute uniformity of benefits in this regard.

The public school system of the State has been placed under the control of the legislature for the general benefit of all the people of the State, and not primarily, but incidentally, for the benefit of the pupils. In any practical operation of the school laws under the constitution, these equal benefits or opportunities cannot possibly be given to each individual. In some portions of the State that are sparsely populated, schools are necessarily placed farther away from some children than in some other portions, and in fact there are some out of the way places where the schools are a considerable distance away.

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It was held in *Leeper v. State*, 103 Tenn., 500, 53 S. W., 962, 48 L. R. A., 167, that public schools are owned and maintained by the State, and the State may prescribe the terms and conditions upon which pupils may enter them, except that it cannot disregard the constitutional injunction, "Tuition shall be without charge and equally open to all."

Necessarily, matters of this kind have to be placed in the hands of administrative officers and a discretion reposed in them as to the location of schools. The consolidation of schools is not required by this act. It is only permitted, and left to the sound discretion of the school officials of a given county as to how the law shall be administered in this respect. Undoubtedly in many instances benefits can be derived by the consolidation of schools. In fact, the consolidation of schools was permitted before this act, namely, under Acts 1873, ch. 25, Acts 1891, ch. 132, and also Acts 1907, ch. 236, section 10, subsection 4.

The transportation of pupils where they are removed some distance from the school is also authorized under the Acts 1909, ch. 264, section 3, as amended by chapter 23, section 2, Acts 1913.

But it is said that the act in question violates the constitution because it only provides for the transportation of children who reside too far away from the school to attend without transportation, in case there is a sufficient number of children so situated. This section of the act is as follows:

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“Be it further enacted, that whenever, by reason of such consolidation, a sufficient number of children is situated too far away from such schools to attend without transportation, said boards of education are hereby . . . empowered to make provisions for the transportation of said pupils that reside too far away from said school to attend without transportation, and to pay for same out of the respective public school funds of the county in which such children reside.”

The objection made to that part of this act which provides for transportation of children is to the effect that, in the process of consolidation of schools, some of the children may live too far away to attend such schools without transportation, and may be denied transportation because there is not a sufficient number in a given place or locality, and that this act on its face recognizes the right of a board to deny transportation to some.

It is further said that all people cannot live near schools nor transportation lines, and therefore it will not do to say that all citizens may or can bring themselves within a situation where they can enjoy the benefits of transportation under the act.

Counsel for the school board, upon the other hand, take the position that a proper construction of the said act of the legislature is that the legislators did not intend by such consolidation to deprive any children of transportation who live too far away to attend otherwise; that the law properly construed, means that the

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board is given authority to provide transportation of pupils without discrimination.

We think a proper construction of the act is that it does give the board a discretion in the matter. Section 2 of the act provides that, where a sufficient number of children reside too far away from such consolidated schools to attend without transportation, the said boards are authorized and empowered to make provision for their transportation. The legislature evidently did not mean to provide transportation in cases where isolated families or children reside so far away from the schools that it would be impracticable to furnish transportation. The purpose of the act was to give the board of education power to discriminate in a reasonable manner, if necessary.

The question then arises: Will this discrimination, or authority in the act to discriminate, subject this section of the act in question to the constitutional objections pointed out?

Section 12 of article 11 of the constitution sets apart the interest on the common school fund to be used for the equal benefit of all the people of the State. But this does not mean that the schoolhouses shall be equally distant from every home, because that is impossible.

The inhibition against class legislation is clearly defined in section 8, article 11, of the constitution, and the provision in section 12 of said article must be read in connection with the provisions of section 8.

The latter section provides that the legislature shall have no power to suspend any general law for the ben-

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effit of individuals inconsistent with the general laws of the land, nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. So it is that, if any citizen may be able to bring himself within the provisions of a law, there is no discrimination within the meaning of the constitution.

Under section 2 of the said act there is no provision inconsistent with this requirement of the constitution, because any member of a community may be able to bring himself within the provision of the law.

Statutes providing for schools and transportation of scholars have been construed in other States. In Vermont a statute was passed upon which provided that the school board might use a portion of the school money, not exceeding twenty-five per cent., for the purpose of conveying scholars to and from schools. The schools were to be located at such places and held at such times as in the judgment of the board of directors would best subserve the interests of education and give the scholars of the community as nearly equal advantages as might be practicable. It was said by the court in a mandamus suit filed against the school directors to compel them to furnish transportation for petitioners' children under this statute:

“The end sought here is equality of school privileges; but the statute clearly recognizes the fact that entire equality is impossible of attainment, and that

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much must be left to the discretion of those in whose hands the administration of the law is placed. The differences in the number of scholars to be provided for, in the means available for the various demands of the work, in the proximity of schools and the condition of roads, and in the ages and strength of scholars, are such as to induce a belief that absolute rules would be more likely to work injustice than the exercise of official discretion. We think it was obviously the intention of the legislature to leave the question of transporting scholars to the discretion of the school directors." *Carey v. Thompson*, 66 Vt., 665, 30 Atl., 5.

In another case to compel conveyance for a school boy who lived four miles from school, under an act authorizing the district board to provide schools and transportation, it was held that the board had a discretion both as to the location of the schools and periods when they should be taught, and also as to furnishing transportation; that this was not a captious discretion, but such an one as would best subserve the interests of education, and as would give to all the scholars of the district as nearly equal advantages as might be practicable; that the pupil's equality of privilege under the statute is limited or modified by its practicability which involves a consideration of its effect upon the success of the school system as a whole; that free schooling furnished by the State is not so much a right granted to pupils as a duty imposed upon them for the public good; that the fundamental purpose of a public school system is the protection and im-

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provement of the State as a political entity; that, while the boy had no absolute right under the statute to be carried, it was held that, with due consideration given the interests of education in general and to the equality of advantages to the individual, it was the duty of the board in that case to furnish transportation during a part of the school year. *Fogg v. Board of Education*, 76 N. H., 296, 82 Atl., 173, 37 L. R. A. (N. S.), 1110, Ann. Cas., 1912C, 758.

Our Acts 1913, ch. 4, should be construed to mean that a discretion is given the county board of education to consolidate schools and to determine when, by reason of such consolidation, a sufficient number of children are so situated that they should be furnished transportation, and in doing so to consider, not only the right of individuals, but also the public good.

And, so construing the act in question, it is not unconstitutional in any respect.

The bill charges that the county board of education had acted in an arbitrary manner, and in a way that would work injustice to complainants and a large number of patrons, and deny them school privileges, because a large number live too far away from the central school ordered to be provided, and so situated as to render transportation impracticable.

It was charged that defendants were ignoring the rule of convenience and disregarding the wishes, welfare, and interest of the taxpayers and patrons of said district, and that the acts of the defendant complained of were arbitrary, and an abuse of power, if such power existed.

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It was also charged that no benefits would be derived by this consolidation, that the term would not be increased, and that no other or different curriculum could be taught in the consolidated school from that taught in the schools as at present constituted and located.

If these charges were sustained by the proof, the action of these officials might be enjoined because of an arbitrary and hurtful abuse of power. But the agreement is made of record that the facts do not warrant complainants' relief on these grounds, and the suit must fail upon the facts of the case.

It is insisted that the act in question provides for supervisors to aid the county superintendent, and that this is equivalent to providing an assistant to that officer, and that this provision confers upon the county board of education the authority to elect an assistant superintendent. This provision of the statute gives authority to employ supervisors of schools as an aid to the county superintendent in the work of organization, gradation, and supervision of the public schools, together with the organization of industrial work, and it is made their duty to supervise the work of teachers.

By section 17, article 11, the constitution provides that:

“No county office created by the legislature shall be filled otherwise than by the people or the county court.”

But are these supervisors county officers? No fixed salary is provided for them, and they hold according

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to no term of office. They are employed in the discretion of the board of education.

In *Prescott v. Duncan*, 126 Tenn., 106, 148 S. W., 229, this court was called upon to determine whether certain appointees of the board of county commissioners were officers within the meaning of said section of the constitution. An act of the legislature applying to Shelby county provided for the appointment by these commissioners of a jail physician, superintendent of county morgue, superintendent of emergency hospital, physician of insane asylum and workhouse, jail engineer, a janitor; an engineer, an electrician, a policeman for the courthouse, a night watchman, and such subordinate help as may be necessary in order to properly conduct the affairs of the county, and these were to receive salaries not to exceed certain amounts.

It was held that the positions provided for were not county officers within the meaning of this section of the constitution, but were employees merely.

The supervisors provided for under the act now in question are only employees to act as aids or assistants in the public school work. There are many subordinate positions and deputies in the conduct of public affairs. It was evidently not intended by the makers of the constitution that all the subordinates and assistants should be elected by the people or the county court.

Other questions were disposed of orally. The court was of opinion that these other questions did not involve any new principle or new application of an old principle of law.

The decree of the chancellor is affirmed.

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*(Jackson. April Term, 1915.)***1. INDICTMENT AND INFORMATION. Names of witnesses. Indorsement. Statute.**

Under Shannon's Code, sec. 7054, requiring the foreman of the grand jury to indorse on the indictment the names of witnesses sworn by him, but that the omission to indorse shall in no case invalidate the indictment if the witnesses were actually sworn according to law, where the plea in abatement, to an indictment for murder, for failure to indorse thereon the names of witnesses examined by the grand jury, disclosed that the witnesses were sworn in fact, the indictment was not invalid. (*Post*, p. 67.)

Acts cited and construed: Acts 1875, ch. 30.

Code cited and construed: Secs. 7054, 7057 (S.).

2. CRIMINAL LAW. Plea in abatement. Late filing.

Where an indictment for murder in the first degree was returned September 9th, and the court remained in session from day to day until September 21st, when a plea in abatement to such indictment set up that names of witnesses before the grand jury were not indorsed thereon as required by statute, the plea came too late, since such pleas are not favored and must be filed at the first opportunity. (*Post*, p. 69.)

Cases cited and approved: *Ransom v. State*, 116 Tenn., 363; *Rivers v. State*, 117 Tenn., 240; *Pennell v. State*, 122 Tenn., 628; *Chairs v. State*, 124 Tenn., 632; *Ashby v. State*, 124 Tenn., 693.

3. CRIMINAL LAW. Appeal and error. Harmless error. Exclusion of evidence.

In a prosecution for murder, where, to establish an alibi, defendant's sister testified that she had seen him come home at a certain hour, and, to corroborate such sister, her lover gave certain testimony as to her having been slightly late to an appointment with him, such lateness, according to the sister's testi-

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mony, having been because she could not leave the house, as she did not wish her brother, the defendant, who had just returned, to see her, the exclusion of the lover's testimony that the girl had told him she was late because her brother was in the house was harmless, where, from testimony admitted, it must have been apparent to the jury that such was the explanation that the witness would have testified she gave him. (*Post*, p. 69.)

Case cited and distinguished: *Legere v. State*, 111 Tenn., 368.

Cases cited and approved: *Hays v. Cheatham*, 74 Tenn., 2; *Dossett v. Miller*, 35 Tenn., 76; *Queener v. Morrow*, 41 Tenn., 123; *Third Nat. Bank v. Robinson*, 60 Tenn., 479.

4. WITNESSES. Corroboration. Previous consistent statements.

In a prosecution for murder, where the State made no effort to impeach, by evidence of former contradictory statements, the testimony of defendant's sister that she had been delayed in keeping an appointment with her lover on account of the return of defendant to the house at a certain hour, which tended to establish an alibi, testimony of the lover himself as to what explanation the sister gave him of her lateness was properly excluded, since proof of prior consistent statements to corroborate a witness is inadmissible, unless the witness is impeached. (*Post*, p. 69.)

5. CRIMINAL LAW. Evidence. Res Gestae.

In a prosecution for murder, where an alibi was sought to be established by the testimony of defendant's sister that she was late in keeping an appointment with her lover because she could not leave the house on account of defendant's return at a certain hour, evidence of the lover that when she met him she gave him such reason for her lateness was not admissible as part of the *res gestae*. (*Post*, p. 73.)

6. CRIMINAL LAW. Circumstantial evidence. Instructions. Degree of proof.

In a prosecution for murder, where the court charged that, if certain facts were found to be true beyond a reasonable doubt,

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then defendant was guilty of murder in the first degree, followed by an instruction that, where circumstances alone are relied upon to convict, the proof must be so cogent, powerful, and well connected as to satisfy beyond a reasonable doubt of defendant's guilt, and to exclude every other reasonable hypothesis, such instructions, taken together, were correct upon the point of the degree of certainty of proof required for conviction. (*Post*, p. 73.)

7. CRIMINAL LAW. Alibi. Sufficiency of evidence.

In a prosecution for murder, evidence *held* insufficient to establish an alibi. (*Post*, p. 75.)

8. HOMICIDE. Motive. Sufficiency of evidence.

In a prosecution for murder, evidence *held* sufficient to establish a motive. (*Post*, p. 75.)

9. HOMICIDE. Guilt. Sufficiency of evidence.

In a prosecution for murder, circumstantial evidence *held* sufficient to show defendant's guilt as excluding every other reasonable hypothesis. (*Post*, p. 76.)

FROM OBION.

Appeal from the Circuit Court of Obion County.—
Jos. E. JONES, Judge.

PIERCE & FRY, J. A. WHIPPLE and J. M. ANDERSON,
for plaintiff in error.

FRANK M. THOMPSON, Attorney-General, for the
State.

MR. JUSTICE GREEN delivered the opinion of the
Court.

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Plaintiff in error was indicted and charged with the murder of George Wehman on July 11, 1914. He was tried and found guilty of murder in the first degree, with mitigating circumstances. The trial judge disregarded the finding of mitigating circumstances and imposed the death penalty, and Dietzel has appealed in error to this court.

The deceased, George Wehman, was a man about fifty-five years of age. He disappeared from his home in Union City on the night of July 11, 1914. Foul play was suspected, and a search was instituted for him. On July 24, 1914, his body was found in a well some two or three miles west of Union City. There was a gunshot wound on the back of his head, by which the doctors testified his death was produced.

Deceased was formerly a barber, but of late years had become a painter. He also appears to have done odd jobs of every kind around Union City, and was an individual of eccentric habits. He had separated from his wife and boarded at the house of a Mrs. Dunn, at the east end of Church street, in Union City. Deceased was miserly in his habits, and testimony in the record indicates that it was a custom of his to carry money on his person, and that this was generally known. Some three or four years before his death he went to a friend of his in Union City and took from his pockets \$2,500 in currency, which he turned over to this friend for safe-keeping. A short while before his death the same friend, Mr. Burdick, saw deceased with about \$140 on his person.

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Wehman carried his money in a red tobacco sack, and he was seen in possession of this sack and to take a roll therefrom by his landlady on the night he was killed, and by a merchant a few days previous thereto. Mrs. Dunn, his landlady, testifies that he was in the habit of counting his money. The deceased had very little to do with other people; and with the exception of Mr. Burdick, heretofore referred to, and one other man in Union City, he was not known to have had any intimate associates.

Plaintiff in error is a young man who has about attained his majority. His home was in Union City, with his father, Herman Dietzel, who appears to be a man of substance and is highly respected in the community. Mr. Dietzel testifies that he started in life as a blacksmith, and, as said before, the record indicates that he has accumulated considerable property. Plaintiff in error has two brothers, who are men of standing, and two young lady sisters. The Dietzels live in a comfortable home in Union City.

Notwithstanding the disparity of age between plaintiff in error and the deceased, and notwithstanding the difference in their social positions and walk of life, plaintiff in error seems to have sought the company of deceased. It is in evidence that these two were together at the town of Rives a few days before the disappearance of deceased. They drove over there from Union City in a buggy and had supper at a restaurant in Rives and tried to get something to drink.

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It appears from the testimony of Mrs. Dunn and of her husband that deceased returned from his work on the night of July 11th about eight o'clock. He went to a hydrant in the yard and washed the paint off his hands with a brush, which he kept for that purpose. Then, going into the house, he paid Mrs. Dunn his week's board; this being Saturday night. She stated that he took two sacks from his pocket, one of which contained a roll of bills, and another contained silver money; that he had all his money out on the table, counting it, and paid her five silver dollars, and returned his roll of bills to the red sack. There is an apparent conflict between Mr. and Mrs. Dunn's testimony as to whether the deceased had his money in one sack or two, as Mr. Dunn recollects that there was only one sack. Mrs. Dunn, however, was in the room with deceased, while her husband was outside, and her opportunities for observing were better. This conflict is immaterial, however, for it is distinctly shown by another witness, a merchant in Union City, from whom deceased bought paint, that the latter did carry his currency in a red tobacco sack.

It was the habit of Wehman to take a bath every Saturday night under a hydrant at a livery stable in Union City. In company with Mr. Dunn, deceased left his boarding house about nine o'clock to go to town for the purpose of taking this weekly bath. The two went west on Church street up to the business portion of the town, where they separated, with the under-

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standing that they were to meet again at Alexander's livery stable at 10:30 p. m. and go home.

Much proof was introduced on the trial as to the respective whereabouts of the deceased and plaintiff in error during the early part of this night of July 11th. We do not find it necessary to review this testimony in detail. As to the deceased, it is sufficient to say that he was seen by a number of persons around the corner of Church street and First street, which appears to be the business center of Union City, at nine o'clock or thereabouts, and that he was seen to go to Corum's livery stable, where he took his bath, and which place he left about ten o'clock. Corum's livery stable is on First street, and fronts to the east. Opposite this stable is a marble yard, and in the rear of the marble yard is Depot street. Then going east there is a park, through which the deceased would naturally have passed on his way home from the livery stable. He was seen to leave the livery stable as though he intended to pass through the marble yard, and he was seen by other witnesses on east Church street, within about three blocks of his boarding house. These witnesses place the time that they saw him at about 10:22 p. m. A gentleman who saw him at the last named point was returning from a picture show and noticed that it was 10:12 by a clock on a store uptown as he passed. He estimates that it took him ten minutes to walk from this store to the place where he saw the deceased. Two ladies met Wehman near this place, and their testimony may be construed as in-

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dicating the time to have been about 10:20. They had been out visiting, and were on their way home. They had left a neighbor's house in the immediate vicinity, but were not sure whether it was a quarter of ten or a quarter after ten when they made their departure.

When seen at this last-named point, the deceased was standing still, off the edge of the sidewalk. The State insists that he was waiting for some one. Plaintiff below undertook to show that it was a habit of deceased to step off the sidewalk when he was about to meet ladies. He was not seen by any one, who testifies in the record, after these witnesses saw him as just related, at 10:22 p. m., July 11th, until his body was discovered in the well.

Plaintiff in error was also uptown on Saturday night between nine and ten o'clock. He was seen by a number of persons in the business portion of the city. He bought a pair of socks at a toggery shop about 9:30, and was seen by another witness at the corner of Church street and First street about ten o'clock, and other witnesses saw him nearer his home and walking as though he were going home at about 10:15 p. m. The testimony of witness Raleigh Dodson, who testified to seeing plaintiff in error within a short distance of his home at about 10:15, is somewhat weakened by the State on cross-examination. The home of plaintiff in error was on east Main street, two blocks north of Church street. The Dunn house, where Wehman boarded, was on east Church street, and leaving the business portion of the city, plaintiff in error would

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pursue the same general direction on his way home that deceased would take to his boarding house.

Leading out from Union City in a westwardly direction are two main roads, known as the Protemus road and the Rockbridge road. The Protemus road is north of the Rockbridge road. Something less than three miles from the corporate limits these two roads, still pursuing the same direction, are connected by a lane or crossroad. About 500 or 600 yards south of the intersection of this lane and the Protemus road was the well in which the body of deceased was found.

The brother of deceased measured the distance from this well to the Dunn house by the speedometer on his automobile, and testified that the distance from the Dunn house to this well by the Protemus road was 3.1 miles, and by the Rockbridge road 3.3 miles.

The theory of the State was that the plaintiff in error took the deceased from Union City to the well referred to in a buggy on the night of July 11th and killed him somewhere on the way and placed his body in the well, returning to town about 11:30. In view of the foregoing testimony as to the whereabouts of the parties on this night, it is urged in behalf of plaintiff in error that it was a physical impossibility for him to have committed the crime in the manner charged.

It is established beyond controversy in the record that Frank Dietzel procured a horse and buggy from Alexander's livery stable on the night of July 11th, and that he left the stable in this rig at about nine o'clock. He was driving a gentle mare, which the liveryman

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calls the Edwards mare, and she was hitched to a no-top buggy.

This horse and buggy was returned to the stable at 11:30. The time is fixed very satisfactorily by employees of the livery stable. These employees were in the rear of the stable and did not see who brought the rig in. The person bringing the rig halloed, left it in front of the stable, and departed immediately. The horse driven, when brought in, was hot, excited, and, as one of the witnesses said, "she was scared to death." This witness further said that he had never seen the mare in such a condition before; that she was very gentle; and that a child could handle her.

In this connection we may dispose of the contention made in behalf of plaintiff in error that it was impossible for him to have driven out to the well and back, killing Wehman, and placing him in the well, within the time the testimony shows he could have had for that purpose. The deceased and plaintiff in error were last seen in the same part of town, as heretofore noted, at 10:20 and 10:15, respectively. They could have gotten together in a very few minutes, and the plaintiff in error still have had more than one hour to drive to the well, commit the crime, and return by 11:30.

'Squire Bratton, who lives on the Protemus road, where it is intersected by the lane referred to, says that he has timed himself and frequently driven from the well in which the body of deceased was found to Union City by the Protemus road in seventeen or eighteen minutes, and that he has traveled from this

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well to town by the Rockbridge road in twenty-five or thirty minutes. He stated that he could do this traveling at an average gait.

Dr. Roberts took this same mare which plaintiff in error had on the night of July 11th and drove from Alexander's stable to the well in sixteen and one-half minutes by the Protemus road and from the well to the stable in twenty-three and one-half minutes by the Rockbridge road. He too said that he drove this distance at an average gait.

So it appears that the round trip between Alexander's stable and the well may be readily made in from thirty-three to thirty-six minutes by the Protemus road, and within forty-seven minutes to an hour by the Rockbridge road.

The testimony as to the mare's condition shows that she was very hot and tired when returned to the stable on this night, and that she must have been driven very rapidly. Other testimony indicates that plaintiff in error returned by the Protemus road, the shorter route.

A witness named Logan, driving out the Protemus road, when near about halfway between the town and 'Squire Bratton's, met a man returning to Union City in a no-top buggy. Logan spoke to this man, but the latter did not reply, and Logan noticed that, although it was a very hot night, the man was covered up, head and all, with a tarpaulin or lap rug. The night was hot, and the covering could only have been used by the individual Logan met for the purpose of concealing his identity.

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So we think that, by driving rapidly and using the Protemus road one way even, plaintiff in error would have had ample time to take the deceased out to this locality, kill him, and put his body in the well. The well was only a few feet from the lane.

It appears from the record that, in addition to the body of the deceased, there were found in this well a towel, a cake of soap, and a brush. These articles were no doubt taken by Wehman with him to the livery stable to be used in bathing, and the fact that they were found with him indicates that he had not returned home, but was picked up somewhere between the stable and Mrs. Dunn's residence. The proof shows that it would have been possible to have gotten out of Union City to this well by either route and avoided passing through lighted streets. Union City is not a large town, and the deceased and plaintiff in error might have started from one point as well as another within the town and reached the well in very nearly the same time.

After this buggy was returned to the livery stable, there was found in it a bloody lap rug. This proposition is controverted by the plaintiff in error, but we think the evidence shows it to be true. The liveryman had two buggies exactly alike. On the night of July 11th, one was let out to plaintiff in error and the other to a young man named Kimsy. The employees of the stable testified that Kimsy had no rug in his buggy. Kimsy is of the same opinion himself. He is not sure, but does not recall having a rug. The employee who

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hitched up Dietzel's buggy swears positively that he gave Dietzel a lap rug when the latter started out.

On the morning of July 12th, when these two buggies were cleaned, this bloody lap rug was found in one of them. The witness first said that he did not know whether it was in the Dietzel buggy or the Kimsy buggy, as the buggies were twins. On reflection, however, he stated that it was bound to have come out of the Dietzel buggy, because Kimsy had no lap rug on the night before. Kimsy also testifies that, if there had been a lap rug in his buggy, there was no possible way in which it could have gotten bloody. He had taken a young lady driving. The blood on the lap rug referred to had not dried on the morning of the 12th, when it was discovered. The lap rug is filed as evidence in the case.

On the next day after the disappearance of Wehman, the plaintiff in error went to the Elk's Club in Union City, of which he was a member. His dues were more than six months in arrears, amounting to \$12. The secretary of the club testified that these dues were paid by plaintiff in error on July 12, 1914.

On the same day plaintiff in error wrote a letter, which is in the record, to a sister-in-law, and inclosed her \$15 on account of an indebtedness that she held against him, and promised to send her more later in the week.

Within two or three days thereafter plaintiff in error called at a tailor's in Union City, named Sutherland, and paid him for a pair of pants which he had

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ordered the week before. This payment was made before the pants were finished.

When the body of deceased was examined, the red tobacco sack in which he carried his roll of currency was missing. There was found on his person the other sack in which he had silver.

A few days prior to his disappearance, deceased paid to Mr. Burdick a \$10 bill in settlement of some transaction between them, possibly a loan made by Mr. Burdick. This bill paid to Mr. Burdick by the deceased was a national bank note on the Third National Bank of Union City, No. H826561A. The bill had a hole in it, was much worn, and was stained from contact with some red substance. Mr. Burdick gave this bill to his son, who put it in the cash drawer. The son testified positively that he did not pay this bill out. He said that it was old and worn, and he disliked to put it in circulation. He says that at the end of the week he gave it to his mother; it being his custom to give his mother money from time to time. Mrs. Burdick preserved this bill, and it was introduced as evidence in this case.

When the plaintiff in error paid Mr. Sutherland for the pants, he gave him a gold certificate for \$10, and Mr. Sutherland gave him back \$2 in change. Mr. Sutherland put this bill in his cash drawer, where he kept it a few days, and then deposited it in the Third National Bank of Union City. On the same day that Mr. Sutherland made this deposit, Mr. Burdick, who was on the lookout for discolored bills stained with red, pro-

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cured the one deposited by Mr. Sutherland from the bank, and it is also in evidence. It is a gold certificate, No. B400669084.

This bill was shown to Mr. Sutherland on the trial of the case, and he was asked if it was not the bill which Dietzel paid to him. He replied:

“That one he gave me was very much like that, possibly the same.”

Mr. Sutherland was asked this question:

“You do not know this \$10 gold certificate from any other, do you?” Answer: “I do not recall having seen one just like that.”

He was again asked:

“You do not know whether this is the same bill you deposited in the bank, do you?” Answer: “To the best of my ability, it is, but I do not know.”

The deposit made by Mr. Sutherland in the bank amounted to only \$55; and while he says that he will not be positive that the \$10 bill in evidence was the one he received from plaintiff in error, because he did not take the number, to the best of his knowledge he thinks it is the same bill. He said that he did not recall having seen any other bill just like that one.

Now comparing the bill introduced by Mr. Burdick, which clearly came from the roll of the deceased, and the Sutherland bill, we find them both stained red, as if from contact with a red tobacco sack. We find them both much worn and raveled along one edge in very much the same manner. At the top of both bills in the right-hand corner is an irregular tear; the tear in the

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two bills corresponding almost exactly. It is extremely probable that they were carried in the same roll and torn at the same time.

It further appears that the secretary of the Elk's Club deposited the \$10 bill received by him from Dietzel in the Third National Bank of Union City, and a \$10 bill was recovered from the Third National Bank and introduced in evidence in this case, and it is likewise stained red.

A number of bills were introduced by defendant below collected from the bank, which were also stained red, and there is proof to the effect that a red stain is a common thing on paper money.

However, no two bills are offered in evidence which bear the striking resemblance to each other that exists between the Sutherland \$10 bill and the \$10 bill which Burdick received from Wehman.

Some days after the disappearance of George Wehman, when search was being made for his body, acting under instruction of the district attorney-general, a witness named Stephens started out to examine the wells in the neighborhood of Union City. Frank Dietzel went with Stephens. Stephens appears to have taken him because of Dietzel's familiarity with the section of country through which they traveled. They went out the Protemus road, turned down the lane heretofore mentioned, went through it, and came back by the Rockbridge road. Dietzel was familiar with this locality. His father had formerly owned the farm now owned by 'Squire Bratton, at the intersection of the

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lane and the Protemus road. Along this lane were three wells, one on the east side and two on the west side. All of them were close to the lane, and in one of them the body of deceased was afterwards discovered.

When Dietzel and Stephens went out on this search, two wells were examined on the Protemus road, and two wells were examined coming back on the Rockbridge road. All of these wells were examined at the suggestion of Dietzel, except one. He pointed them out. Stephens was not acquainted in this locality. In passing through the lane, however, through this country, in which the proof shows he had been hunting for years, and with which he was thoroughly familiar, Dietzel did not look into any of the three wells along the lane, nor did he tell Stephens of their existence.

On the morning after the disappearance of Wehman, plaintiff in error was seen driving through this lane. He was there again on July 13th, about dusk. He was also in this neighborhood about eleven or twelve o'clock at night on July 13, 1914. He was seen there again late Wednesday evening in the lane, coming from the direction of the well. Between Wednesday and the time of the discovery of deceased's body, plaintiff in error was seen in this lane two or three other times. On all these occasions he was alone, and was there without any apparent object.

There is only one witness in the record who undertook to testify that he saw deceased and plaintiff in error together on the night of the former's disappear-

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ance. This witness stated that he saw them sitting on the steps of the C. B. A. Building, at the corner of Church street and First street. He said that Dietzel spoke to him, and that the man with Dietzel looked to the witness like George Wehman. He admits, however, that Dietzel's companion had his hat pulled down over his face, and witness could not be absolutely certain that the man was George Wehman. This, though, is immaterial. A number of witnesses saw both these parties on First street, near the corner of Church street, between nine and ten o'clock, and the two had abundant opportunities to meet and arrange for the trip to the country later in the night if such arrangement had not been previously made.

Plaintiff in error rests his defense largely upon an alibi endeavored to be established for him by members of his family. His father and mother and his two sisters were at home that night. They lived in a two-story house; the father and mother occupying a front room downstairs, and the two sisters a room upstairs immediately over their parents. The room of plaintiff in error was upstairs across a hall from his sisters' room.

Herman Dietzel, the father, testified that he and his wife sat up on the night of July 11th until ten o'clock. They then began their preparations for retiring, and got to bed about 10:15. Mr. Dietzel states that, shortly after he went to bed, plaintiff in error entered the house and came to the door connecting the father's

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bedroom with the front hall, and told his father that a Mr. Cockrill had died that night at the hospital. Dietzel, Sr., said that plaintiff in error stood at the door talking to him for about one minute, and then went upstairs to his room.

Mrs. Dietzel testified to the same effect as her husband.

Miss Nellie Dietzel, the younger sister of plaintiff in error, about nineteen years of age, testified that she and her sister Minnie retired about the same time that their parents did. She said that her sister immediately went to sleep, but that she remained awake. It appeared from her testimony that she had a sweetheart, named Marshall Wright, and that she had made an engagement to meet him in a grape arbor on the Dietzel premises that night at eleven o'clock. Marshall Wright had been forbidden by her parents to call on her, and she was not able to see him, except in a clandestine manner.

So she stated that she undressed and went to bed and pretended to be asleep. She said that, while lying in bed, at about 10:30 her brother Frank came in and went to his room. According to her statement she had her watch with her and noticed the time in order to be sure of keeping her engagement with Marshall Wright at eleven o'clock. Her testimony is that her brother went to his room, turned on the light, and began to read and in a few minutes went back to the bathroom. When he went into the bathroom she then saw an opportunity to get out without attracting his attention, so

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she slipped past the bathroom into an upstairs room in the rear of the house. She said that she remained concealed in this room until her brother left the bathroom, and she then came downstairs and went out to the grape arbor, where she found her sweetheart waiting. She testified that she told Marshall Wright when she got there that she was afraid she would be unable to get out on account of her brother Frank's presence, and that she got to the arbor about three minutes late; that is, about three minutes after eleven o'clock. She stated that she remained with Marshall Wright about one hour; that she noticed a light in her brother's room; and that it continued to burn for thirty minutes or more.

Marshall Wright was introduced for the defendant, and corroborated the testimony of the young lady as to her engagement with him and as to her being a little late. He stated that he noticed a light in Frank's room when he got there, but did not observe how long it continued to burn. He further stated that Miss Nellie explained to him why she was late. He was not permitted, however, to tell the jury what her explanation was, and the exclusion of this evidence by the court is made the basis of an assignment of error, which will be hereafter referred to.

It was pointed out by the attorney-general in argument that, if events transpired in the manner detailed by this young lady on the stand, she must have gone out in her nightclothes to meet her sweetheart, a circumstance which is altogether improbable and tends

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to weaken her entire testimony. The attorney-general gathered from the young lady's statements that she had undressed and gone to bed, and that she left the bed immediately upon her brother's going to the bathroom, passed then to the unoccupied room in the rear of the house, and immediately upon her brother's leaving the bathroom she went downstairs. She stated that she had fully undressed in order to avoid arousing any suspicion on the part of her sister, and it is argued that she had no time or opportunity to put on clothes before going out, if everything happened just as she related it.

The foregoing constitutes a summary of the important facts in the case. We will return to the consideration of these facts again in passing on the assignments of error which challenge the sufficiency of the evidence to sustain the verdict of the jury.

Passing now to the errors of law, it is contended on behalf of plaintiff in error that the trial judge improperly struck from the files a plea in abatement which challenged the regularity of the indictment filed in this case.

The point made on the indictment is that the names of the witnesses examined by the grand jury, upon whose testimony the indictment was founded, are not indorsed on the back thereof. Plaintiff in error relies on section 7057 of Shannon's Code, as follows:

“Witnesses Indorsed.—When presentment is made upon evidence of witnesses sent for by the grand jury, the names of the material witnesses for the State, ex-

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amined before the grand jury, shall in all cases be indorsed thereon before it is presented to the court.”

The trial judge held that the plea in abatement was not sufficient, and furthermore that it came too late.

The section of the Code quoted is taken from the act of 1823. This act on its face applied only to presentments and not to indictments. By chapter 30, Acts of 1875, carried into Shannon’s Code at section 7054, it is provided as follows:

“It shall be the duty of the foreman of the grand jury to indorse on the indictment, or, if it be a presentment, on the subpoena, the names of the witnesses so sworn by him, and sign the same officially, and the omission to indorse the same on the indictment or subpoena shall in no case invalidate the finding of the indictment or presentment, if the witnesses were, in point of fact, sworn by him according to law.”

In so far as section 7057 provides that the names of the witnesses shall be indorsed upon a presentment, it is repealed or modified by a later act (section 7054), which provides that, when a presentment is returned, the names of the witnesses shall be indorsed on the subpoena. The provision that the names of the witnesses shall be indorsed on an indictment is found in our law the first time in section 7054, Shannon’s Code, chapter 30 of the Acts of 1875, a statute which in terms enacts that the omission to so indorse the indictment shall not invalidate the indictment “if the witnesses were in point of fact sworn . . . according to law.”

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The plea in abatement itself discloses that the witnesses were sworn before the grand jury. So we must hold by reason of section 7054, Shannon's Code, that the indictment found was not invalidated by the failure to indorse thereupon the names of the witnesses examined, inasmuch as it is made to appear that these witnesses were in point of fact sworn according to law.

Moreover, the trial judge was right in holding that this plea in abatement came too late. The defendant below was arrested and committed to jail on July 24, 1914. Court met, and the grand jury was impaneled September 7, 1914. The indictment herein was returned September 9, 1914, and the court remained in session from day to day until September 21, 1914, when the plea in abatement was filed; that is to say, the plea in abatement was not filed until twelve days after the indictment was returned. It came too late. The law is well settled to this effect. Such pleas are not favored and must be filed at the very first opportunity open to a defendant. *Ransom v. State*, 116 Tenn., 363, 96 S. W., 953; *Rivers v. State*, 117 Tenn., 240, 96 S. W., 956; *Pennel v. State*, 122 Tenn., 628, 125 S. W., 445; *Chairs v. State*, 124 Tenn., 632, 139 S. W., 711; *Ashby v. State*, 124 Tenn., 693, 139 S. W., 872.

Another assignment is predicated on the action of the court in excluding certain testimony of Marshall Wright, to which we have heretofore adverted.

Wright was called by the defendant below and permitted to testify that he came into Union City on the night of July 11, 1914, called up Miss Nellie Dietzel

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over the telephone, and made an engagement to meet her at eleven p. m. in the grape arbor. He was further permitted to testify that he reached the trysting place a few minutes before eleven o'clock; that he heard the town clock strike eleven; and that Miss Nellie arrived in a few minutes afterwards. He stated that he saw a light in the bathroom, which was turned out in about five minutes; that Miss Nellie came down just after the light in the bathroom was turned out; and that a light in the southeast upstairs room of the residence (otherwise shown to have been Frank Dietzel's room) was turned on a few minutes after he reached the premises, and that this light remained on until after Miss Nellie came to the arbor. He was then asked if Miss Nellie made any explanation as to why she was late, and he said that she did; but the court did not permit him to state what this explanation was in the presence of the jury. Speaking to the stenographer, witness said that Miss Nellie told him:

“She said the reason she did not come down on time was that Frank was in the bathroom. He was up there, and she couldn't (come) down while he was in the way, so she could not get down, as he was where he could hear her.”

The jury must have been dense indeed if they did not infer, from the testimony Wright was allowed to give, what Miss Nellie's explanation was as to the cause of her delay. His testimony showed that there was a light in Frank Dietzel's room; that the bathroom was lit up for about five minutes; and that, im-

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mediately after the light in the bathroom was turned out, the young lady arrived, and that Frank Dietzel's bedroom light still remained on after Miss Nellie came down. It must have been obvious that the explanation she gave was that Frank delayed her arrival. So we think the exclusion of the testimony quoted could not have done the plaintiff in error any particular harm. The witness Wright was allowed to corroborate Miss Nellie Dietzel in practically every detail of her testimony.

Aside from this, however, we hardly think the explanation made by the young lady to Marshall Wright was competent.

The general rule undoubtedly is, where evidence of contradictory statements is offered to impeach the credit of a witness, testimony that on former occasions the witness made statements sustaining those made by him on the stand is inadmissible.

This court undertook to state the exceptions to this rule in *Legere v. State*, 111 Tennessee, 368, 373, 77 S. W., 1059, 1060, 102 Am. St. Rep., 781. The court there said:

“So it may be said it is now established in this country that where it is charged that the testimony of the witness is a recent fabrication, and is the result of some relation to the party or cause, or of some motive of personal interest, it may be supported by showing he had made a similar statement before that motive or relation existed.”

See, also, *Hayes v. Cheatham*, 6 Lea, 2; *Dossett v.*

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Miller, 3 Sneed, 76; *Queener v. Morrow*, 1 Cold., 123; *Third National Bank v. Robinson*, 1 Baxt., 479.

The material portion of the young lady's testimony was that indicating that Frank Dietzel was at home on the night of July 11th. There was no real effort made by the State to impeach this testimony by any evidence of former contradictory statements. It was conceded by the State in cross-examination that the witness testified at the coroner's inquest she heard her brother in his room on this night. There was no suggestion in the cross-examination that her testimony as to her brother's presence at home was a recent fabrication. The only point made upon her testimony was that the State insisted she formerly claimed to have heard Frank in his room, not to have seen him, when she was examined before the coroner. Inasmuch as the young lady testified before the coroner that her brother was at home, and the State conceded on the cross-examination at the trial that she had so testified, there was no occasion for her corroboration. There was no necessity for admitting the explanation that she made to Marshall Wright. Whether or not she met Marshall Wright that night was not material to any issue in the case.

Until a witness is impeached, at least by cross-examination, proof of prior consistent statements is inadmissible. Such proof is unnecessary and without value.

"The witness is not helped by it, for even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repe-

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titions of it. Such evidence would be both irrelevant and cumbersome to the trial.” 2 Wigmore on Evidence, section 1124, and cases there cited.

So, being of opinion that no impeachment of this witness on any material detail of her testimony had been attempted by the State, we think the circuit judge correctly excluded the evidence of Marshall Wright as to her explanation made to him.

With due respect to learned counsel pressing the suggestion, the court is unable to see how the evidence excluded could possibly be considered a part of the *res gestae* in this case.

It is said that the court erred in charging the jury that if certain facts were found by them, as set out in the charge, to be true beyond a reasonable doubt, then the defendant would be guilty of murder in the first degree.

It is insisted that the court should have charged that the evidence must exclude every reasonable hypothesis, other than the guilt of the accused, in order for them to convict. An examination of the entire charge answers this criticism, for we find that the court in another portion of the charge instructed the jury in these words:

“If, therefore, the proof in this case convinces and directs your understanding and satisfies your reason and judgment of the defendant’s guilt, you will convict him of the degree of crime, of which you are satisfied that he is guilty; if it does not, you will acquit him. The defendant may be convicted or acquitted upon the

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proof of circumstances tending to show his guilt or innocence, as well as by direct and positive testimony showing his guilt or innocence. However, when circumstances alone are relied upon by the State to convict the defendant, then the proof of the circumstances must be so cogent, powerful, and well connected as to satisfy you, beyond a reasonable doubt, of the defendant's guilt, and to exclude every other reasonable hypothesis than that of defendant's guilt. If the circumstances proven, tending to show defendant's guilt, are so powerful, cogent, and well connected as to exclude every reasonable hypothesis than that of defendant's guilt, you should convict him; if they fail, when all taken together, to exclude every reasonable hypothesis than that of defendant's guilt, you should acquit him."

Returning now to a consideration of the evidence, is it so strong as to exclude every other reasonable hypothesis than that of the guilt of plaintiff in error?

As to the alibi offered in behalf of the plaintiff in error, it is perhaps most charitable to say that this alibi rests alone upon the testimony of his father, his mother, and his sister. The State attempted, with some degree of success, to involve the father in contradictions, making a comparison of his testimony on the trial with his testimony before the coroner. Without considering in detail the evidence of these members of the family of plaintiff in error, it is sufficient to point out that the life of the boy was at stake, and this testimony must be weighed accordingly.

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It appears to the court that this alibi is utterly destroyed by a conclusion, forced upon us from other evidence in the record, that Frank Dietzel brought the buggy back to the livery stable at 11:30 p. m. If he did bring the buggy back to the stable at that hour, as a matter of course he could not have been at home during the time at which the members of his family testified he was there. The hour when this buggy was returned is very definitely established by employees of the stable by reference to a passing train; the time of that train being known and proven.

It is impossible to believe that this buggy was returned by anybody other than Frank Dietzel. He took the buggy out, and, if any one else had brought it back, we may be assured that diligent counsel would have developed that fact on the trial. It is virtually conceded by counsel for plaintiff in error that he did secure the buggy at 9:30, and there is no suggestion in the proof offered in his behalf that he turned this buggy over to anybody else, or that anybody else could have returned it to the stable. How can the alibi stand under these circumstances?

It is urged on behalf of plaintiff in error that there was no motive for his crime. It is insisted that his father was possessed of ample means, to which the young man had free access. We do not think the record discloses this condition of affairs. It appears that Herman Dietzel was a man of substance, but, when asked about the money with which his boy was supplied, he said he allowed the boy to have what he (the

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father) thought he needed. Herman Dietzel is a self-made man, who started out as a blacksmith, and by thrift accumulated a competency. There is a wide difference between the estimate of such a man, and the estimate of a young man about grown, as to the amount of money the latter needs. The record does not indicate that plaintiff in error had any employment, and that he was short of cash and pressed for funds is evidenced by the fact that his club dues were more than six months in arrears when paid on the day after Wehman's disappearance.

We think it also true that Wehman must have had the reputation in the community of carrying money on his person. Mr. Burdick so states. The circumstance that he had at one time accumulated in his pockets as much as \$2,500 could not have escaped notice and general repute in a town like Union City. Furthermore, his landlady testified that he was always counting his money.

What motive could a young man, in the standing of plaintiff in error, have had for seeking the company of an eccentric laborer like the deceased, and driving him around over the country? Could he have been up to anything good?

For what purpose did the plaintiff in error hire this rig on the night of July 11th, and what did he do with it? How did his lap rug become saturated with blood, and whose blood could it have been, save that of the deceased?

Who else was on such terms with deceased as to in-

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duce the latter to take a midnight drive with him, and who but the plaintiff in error was it that the witness met returning to Union City on the Protemus road with his face concealed by the lap rug? From whence was this disguised individual coming, except from the scene of this crime?

Why was the plaintiff in error paying his debts on the Sunday after the disappearance of George Wehman? Do men ordinarily settle their obligations on Sunday? If plaintiff in error had the money to pay his club dues prior to Sunday, why should he have delayed, and why should he have waited to settle with his sister-in-law? If he had just gotten this money, where did it come from? Why is no explanation offered as to its source?

Is it likely that the tailor could have been mistaken as to the identity of the \$10 bill paid to him by plaintiff in error on the Wednesday following the crime? Could this \$10 bill, with its peculiar characteristics, have been mistaken in a small deposit of only \$55 accumulated by the tailor in a few days?

Is it possible that Burdick and his wife could have been mistaken as to the identity of the bill they had from deceased?

Were two bills ever worn, torn, and discolored in a manner so strikingly similar as the Burdick bill and the tailor's bill? Could one have been so torn and worn, unless it had been carried with the other? Where could these bills have come from, except from the red tobacco sack where George Wehman carried his roll?

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Why did plaintiff in error, perfectly familiar with the country, when making a search for the body of deceased, omit to look into the wells along the lane connecting the Protemus and the Rockbridge roads? Why should he have overlooked these wells, and searched others, both going out and returning?

Why should he have visited this remote locality on the day after George Wehman's disappearance? Why should he have been there on Monday, on Tuesday, on Wednesday, and on other days thereafter? What could have drawn the plaintiff in error to this lonesome lane on the days following the crime, except that mysterious and proverbial force that impels a murderer to return to the scene of his iniquity, or to the place where he has hidden his victim? Why should the prisoner have haunted this vicinity, as long as he was free, unless like that other murderer:

“All night he lay in agony,
From weary chime to chime,
With one besetting horrid hint,
That racked him all the time;
A mighty yearning like the first
Fierce impulse unto crime.

One stern, tyrannic thought, that made
All other thoughts its slave;
Stronger and stronger every pulse
Did that temptation crave,
Still urging him to go and see
The Dead Man in his grave.”

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Who can answer the questions we have propounded so as to exculpate Frank Dietzel from this murder? What explanation of these circumstances can be made to consist with his innocence?

If he can be so exculpated, if there is such an explanation, why does he remain silent? His learned counsel have made a brave fight in his behalf, conducted with zeal and distinguished ability; but notwithstanding all they have said, on the record before us, we are convinced of the guilt of the plaintiff in error. The circumstances seem to us to exclude every other reasonable hypothesis.

Nevertheless, since there is here, as in every case of circumstantial evidence, a possibility (a bare possibility in this case) of mistake, we prefer to heed the expression of the jury and commute this sentence to life imprisonment.

As thus modified, the judgment below will be affirmed.

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ANDERSON-TULLY Co. *et al.* v. THOMPSON *et al.*
STATE, *ex rel.* RAINE, v. TATE, SHERIFF.*

(*Jackson.* April Term, 1915.)

1. EQUITY. Jurisdiction. Lands in another State.

An equity court has no jurisdiction to entertain a suit to try title to or to recover possession of land, or to enjoin a threatened trespass, where the land is situated in another State, so that, to enforce its decree, the process of the court would have to act upon the property, since such actions are local, not transitory, while equity acts *in personam*, not *in rem*. (*Post*, p. 87.)

Cases cited and approved: Penn v. Lord Baltimore, 1 Vezey, 148; Arglosse v. Muschamp, 1 Vernon, 75; Earl of Kildare v. Sir Morrice Eustace and Fitzgerald, 1 Vernon, 419; Toller v. Carteret, 2 Vernon, 494; Watkins v. Holman, 16 Peters, 25; Watts v. Waddle, 6 Peters, 389; Pennoyer v. Neff, 95 U. S., 723; Burnley v. Stevenson, 24 Ohio St., 478; Seixas v. King, 39 La. Ann., 510; Johnson v. Kimbro, 40 Tenn., 557; Miller v. Birdsong, 66 Tenn., 531; W. N. Tel. Co. v. W. & A. R. R. Co., 67 Tenn., 54-61; Kirklin v. Atlas Svgs. & Loan Assn. (Tenn. Ch. App.), 60 S. W., 149; Miss. & Mo. R. R. Co. v. Ward, 67 U. S., 485; Nor. Ind. R. R. Co. v. Mich. Cent. R. R. Co., 56 U. S., 232; Salton Sea Cases, 172 Fed., 792; Great Falls Mfg. Co. v. Worster, 23 N. H., 462; Mattix v. Swepston, 127 Tenn., 693.

Cases cited and distinguished: Telegraph Co. v. Railway, 67 Tenn., 54; Massie v. Watts, 6 Cranch, 148.

2. EQUITY. Jurisdiction of person. Enforcement of contract concerning foreign lands.

Where plaintiffs, by contract with the defendants, had the right to remove timber from certain lands in another State, a court

*The authorities passing upon jurisdiction of equity over suits affecting real property in another State or county are presented in the notes in 69 L. R. A., 673; 23 L. R. A. (N. S.), 924, and 27 L. R. A. (N. S.), 420. Specifically as to jurisdiction to enjoin acts with respect to real property in another State see notes in 69 L. R. A., 689; 7 L. R. A. (N. S.), 114, and 25 L. R. A. (N. S.), 917.

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of equity, having jurisdiction of the persons of defendants. could restrain them, from unlawfully interfering with the plaintiffs in removing the timber under the contract, although the rights involved grew out of such real estate, since the only action required of defendants, to afford the plaintiffs a complete remedy, was merely to refrain from unlawfully and fraudulently interfering by themselves or servants. (*Pos . p. 89.*)

FROM SHELBY.

In Anderson-Tully v. Thompson:

Appeal from the Chancery Court of Shelby county.
—F. H. HEISKELL, Judge.

BROWN & ANDERSON, for appellant.

THOS. M. SCRUGGS, for appellee.

In State, *ex rel.* v. Tate:

Appeal from the Probate Court of Shelby County.—
J. S. GALLOWAY, Judge.

T. M. SCRUGGS, for appellant.

BROWN & ANDERSON, for appellee.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The question presented in each of these cases, which were tried together, is whether or not the chancery court had jurisdiction to enjoin the defendants E. D., J. M., and Frank Thompson from interfering with complainants Anderson-Tully Company, their agents,

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servants, and employees, from removing timber cut from certain lands in the State of Arkansas. The Anderson-Tully Company had conveyed to defendants these lands, reserving the right to cut and remove the merchantable timber therefrom until January 1, 1914.

It was charged that the Thompsons, for the purpose of delaying the cutting and removing of the timber, had leased all available landing points along the Mississippi river, it appearing that the lands lie along the river, and that the only means of removing the timber was by access to the river; that in addition to securing the landing points, defendants had obstructed a bridge, which was used as a means of getting the timber out, by building a wire fence across it, and had threatened that the servants and employees of complainants would be arrested or bodily injured if they continued to use the means provided to get the timber out, and otherwise obstructing the removal thereof within the time stipulated in the deed.

It was charged that these obstructive measures were resorted to in order that defendants might become the owners of the timber left on the land. The bill prayed for an injunction restraining these various acts of the defendants. Fiat was obtained and the injunction issued and executed.

The bill was filed in August, 1913. On January 7, 1914, an amended and supplemental bill was filed by complainants, alleging that they had been delayed more than a month in their work on account of these interferences, setting out the various means resorted

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to, and charging that since the filing of the bill and notwithstanding the injunction the defendants had continued threatening the use of a shotgun if the agent of complainants should attempt to go upon the lands, and that they did not intend to permit any more hauling from the land.

It was stated that approximately 400,000 feet of timber was cut lying on the ground, which was personal property under the laws of Arkansas, and complainants prayed the court for an extension of thirty days' time within which to remove the logs, and for injunction. Further injunction was issued, directing defendants to refrain from interfering in any manner with the Anderson-Tully Company in the removal of the timber cut before December 31st, which was still on the lands, and also directing that complainants should have time until further order by the court to go upon the lands and remove the timber which had already been cut.

At a later date, complainants filed a petition, charging that defendants, their agents and employees, had violated this injunction by going upon the lands with shotguns and threats to kill, and disorganized and demoralized the work and prevented the removal of the timber. Another petition was filed later, alleging similar acts of disobedience, and stating that the defendants had been arrested and tried under the first injunction and found guilty of contempt of court, but upon their promise to cease interfering, no decree had been entered; that, notwithstanding this, they had con-

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tinued these acts of interference, and a second attachment was asked for, which was granted by the chancellor. On the hearing of this attachment, defendants were found guilty of contempt of court, and a fine of \$50 was imposed on each of the three defendants, who were also committed to the jail in Shelby county, there to remain until such time as they should purge themselves of contempt, by causing their agents to be removed from the premises so as not to interfere with the further removal of the timber.

On the same day, a petition for writ of *habeas corpus* was filed by defendants in the probate court of Shelby county, attacking the jurisdiction of the chancery court to adjudge defendants guilty of contempt, and seeking their release. The writ was issued and served, and defendants in the chancery case were discharged. From the order in the chancery case, the defendants appealed, and from the order in the probate court the defendant T. G. Tate, sheriff, appealed. So, as heretofore stated, the only question made in these causes is whether the chancery court had jurisdiction to grant the injunction.

It is conceded that the evidence is sufficient to justify the court in proceeding to punish for contempt.

Counsel for the Thompsons take the position that the court had no jurisdiction to enjoin the doing or refraining from doing of things outside the State. The Thompsons rely very largely upon the opinion of the court in *Telegraph Company v. Railway*, 8 Baxter, 54. In that case injunction was refused on the ground that

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the court could not enforce its decrees against agents of the defendant in the State of Georgia. The injunction required that the railway company permit the agents of the Western Union Telegraph Company to occupy and use the offices of the railway company in doing business. The right was claimed under a certain contract for the telegraph company to use the buildings and depots of the railway company in the sending of messages and the doing of other business, and it was charged that the railway company had failed to pay the telegraph company for messages received in accordance with the contract, the line of road running from Atlanta to Chattanooga. The suit was brought in Hamilton county, Tennessee. It was held that the injunction was proper so far as the company or its agents were within the State of Tennessee, and the chancellor was affirmed in his refusal to enjoin as to agents and property in the State of Georgia. It was held that the court would take jurisdiction to enforce a contract respecting lands lying beyond its jurisdiction when it has jurisdiction of the parties and can act *in personam* in the enforcement of its decrees, but that it will not take jurisdiction when full and complete relief cannot be granted and enforced without the exercise of authority over property situated in another State.

The principles stated in the case in 8 Baxter, cited above, are not at variance with the well-settled law upon the subject. Our courts in Tennessee have often held that an injunction may issue in chancery to com-

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pel the specific performance of contracts or the execution of deeds respecting lands lying beyond the jurisdiction of the court.

In the noted case of *Penn v. Lord Baltimore*, 1 Vezey, 148, the chancellor of England decreed the specific performance of a contract respecting lands lying in North America. It was objected that the court could not enforce its decree *in rem*, but the chancellor gave no weight to the argument, saying that the strict primary decree of a court of equity is *in personam*, and may be enforced in all cases where the person is within its jurisdiction.

Chief Justice Marshall in *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed., 181, after citing *Penn v. Lord Baltimore*, *supra*, *Arglosse v. Muschamp*, 1 Vernon, 75, *Earl of Kildare v. Sir Morrice Eustace and Fitzgerald*, 1 Vernon, 419, and *Toller v. Carteret*, 2 Vernon, 494, in all of which rights were enforced in England affecting real estate lying in other jurisdictions, said:

“Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree. The inquiry, therefore, will be whether this be an unmixed question of title, or a case of fraud, trust, or contract.”

There are many cases of high authority holding to this doctrine. For the purpose of illustration, it will

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be sufficient to cite the following: *Watkins v. Holman*, 16 Peters, 25, 10 L. Ed., 873; *Watts v. Waddle*, 6 Peters, 389, 8 L. Ed., 437; *Pennoyer v. Neff*, 95 U. S., 723, 24 L. Ed., 565; *Burnley v. Stevenson*, 24 Ohio St., 478, 15 Am. Rep., 621; *Seixas v. King*, 39 La. Ann., 510, 2 South., 416; *Works on Courts and Their Jurisdiction*, pp. 32, 33; *Johnson v. Kimbro*, 3 Head, 557, 75 Am. Dec., 781; *Miller v. Birdsong*, 7 Baxt., 531; *W. U. Tel. Co. v. W. & A. R. R. Co.*, 8 Baxt., 54-61; *Kirklin v. Atlas Svgs. & Loan Ass'n* (Tenn. Ch. App.), 60 S. W., 149.

Where a suit is to try title or recover possession of land so that the process of the court in the enforcement of its decrees would have to act upon the property, the action is local and not transitory. The jurisdiction in such case is where the land is situated. Equity will not take jurisdiction where the court cannot grant complete relief, except by undertaking authority over property lying beyond its jurisdiction. If a court would be powerless to punish for contempt of its authority it will not enjoin.

It has also been frequently held that in actions for trespass or injury threatened or done to real estate where it directly affects the property itself, the action is purely local. *Miss. & Mo. R. R. Co. v. Ward*, 67 U. S., 485, 17 L. Ed., 311; *Nor. Ind. R. R. Co. v. Mich. Cent. R. R. Co.*, 56 U. S., 232, 14 L. Ed., 674; *Salton Sea Cases*, 172 Fed., 792, 97 C. C. A., 214; *Great Falls Mfg. Co. v. Worster*, 23 N. H., 462.

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A case very closely in point was decided by the former court of chancery appeals of this State in an opinion delivered by Mr. Justice Wilson, which was confirmed orally by the supreme court. The parties to a suit in equity to restrain the defendant from interfering with the possession of certain real estate alleged to be owned by the complainants were before the court, and it was held that the court had power to grant the relief prayed for, although the land in question was situated in another State. *Kirklin v. Atlas Savings Association* (Tenn. Ch. App.), 60 S. W., 149.

This court had occasion to pass upon a question somewhat similar to that now before the court in the recent case of *Mattix v. Swepton*, 127 Tenn., 693, 155 S. W., 928, the opinion in that case being rendered by Mr. Justice Lansden. The plaintiffs had bought a boundry of timber in Crittenden county, Arkansas, from one Maudlin. The contract gave the plaintiffs five years in which to cut and remove the timber, and also granted them the right of way over adjacent lands of Maudlin for the purpose of hauling the timber when cut over Maudlin's lands to the railroad. The plaintiffs entered into possession of the land, and cut and removed the timber under their contract for about one year, when Maudlin leased the lands over which plaintiffs had acquired the right of way, to defendant Swepton. The latter obstructed the right of way over which plaintiffs had an easement, and by threats of violence maintained the obstruction and prevented plaintiffs from using the right of way, as a result of

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which they were unable to cut and remove the timber, and for this injury they sued in an action of damages. The question in the case was as to whether the action was transitory and could be maintained in this State, where the defendant was found. It was held that the plaintiffs' right to use the way was in privity of contract with the owner, and not in privity of estate or title; that it was merely appurtenant to the right to cut and remove the timber; and that the cause of action did not consist alone of the defendant's wrongful conduct concerning the real estate, but embraced plaintiffs' right under the contract which was destroyed by the defendant's misconduct. It was held that this was very different from a case of injury to real estate, and that damages could be recovered on the ground that defendant by personal act had injured plaintiff's business.

The complaint is not of anything affecting the real estate in such way as that the process of the court would have to operate upon the property, but the acts here complained of are so far personal in their nature that the mere ceasing of personal action or the withdrawal of the person from the property or rights of way will effect the remedy. The defendants are personally before the court, and the court may direct their personal movements, even though such movements in a way affect rights growing out of real estate. When a court directs that a deed be executed conveying real estate by a party before the court, it will operate even to the extent of changing the title to the land. Nev-

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ertheless, the action of the party is one of a personal nature. The court will compel this personal act because it has jurisdiction of the person and can direct his movements. There is no difference in principle in directing that these defendants cease from interference by threats of intimidation and obstruction of rights of way, to those well-recognized acts affecting real estate which may be directed by the courts.

As hereinbefore pointed out, these defendants had the control of their agents and could say to them, "You must cease from interference with the complainants' right to remove this timber," and it would be done. In fact, without their instruction, none of the acts complained of would have been done. When the defendants cease activity and direct that persons under their control likewise desist from interference with complainants' rights, there will be nothing left to prevent their removing the timber.

The acts of interference complained of were fraudulent in their nature, being in violation of contract rights existing between the parties, and alleged to have been committed for the purpose of preventing the removal of timber until the time expired, under the contract, so it would then become the property of defendants. If, therefore, the question be determined by the rule laid down by Chief Justice Marshall, as we think it fairly may, "whether this be an unmixed question of title or a case of fraud, trust, or contract," we conclude at once that it does not involve title, but is clearly a case of personal rights under contract, involv-

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ing fraud of the parties. It was clearly within the duty and power of the chancery court to grant the injunction.

The probate court committed a grave error in undertaking to review and prevent the chancery court's authority in the punishment of willful offenders, guilty of repeated violations of its injunction, under the circumstances.

The court of civil appeals was correct in affirming the action of the chancellor and reversing the order of the probate court. The writ of *certiorari* is therefore denied.

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COLE v. TAYLOR.*

(Jackson. April Term, 1915.)

1. **SLAVES. Legitimation. Direct and collateral inheritance.**

Under Acts 1865-66, ch. 40, secs. 1, 2, giving to all negroes and their descendants having any African blood the right to inherit, and section 5, limiting the right of inheritance by children of former slaves to property acquired by their parents, the right of inheritance does not extend beyond direct inheritance from the parents, and does not include the right of collateral inheritance, and this declared policy of the State the courts, on the ground of comity alone, will not vary, so as to allow a collateral inheritance between children of a legitimized slave marriage coming from other States which it does not allow to native former slaves; so that a woman born in slavery under a slave marriage, who, with her brother, was legitimized by the law of another State, could not inherit from her deceased brother. (*Post*, p. 95.)

Cases cited and approved: *Carver v. Maxwell*, 110 Tenn., 75; *Jones v. Jones*, 234 U. S., 616; *Williams v. State*, 67 Ga., 262; *Tucker v. Bellamy*, 98 N. C., 31; *Jones v. Hoggard*, 108 N. C., 178; *Williams v. Kimball*, 35 Fla., 49; *Sheperd v. Carlin*, 99 Tenn., 64.

Cases cited and distinguished: *Gregley v. Jackson*, 38 Ark., 487; *Miller v. Miller*, 91 N. Y., 315.

2. **SLAVES. Legitimation. Status.** The status of legitimacy of the children of slave marriages fixed by the laws of one jurisdiction follows the person, and should be sustained in every State to which he may go, though the rule must yield to the policy of the State of adoption so far as inheritance is concerned. (*Post*, p. 102.)

Acts cited and construed: Acts 1865, ch. 40, secs. 1, 2, 5.

Cases cited and approved: *Finley v. Brown*, 122 Tenn., 335; *Cope*

*The authorities passing upon conflict of laws as to legitimacy are reviewed in a note in 65 L. R. A., 177.

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v. Cope, 137 U. S., 682; Levy v. McCartee, 6 Pet., 102; Blythe v. Hinckley, 180 U. S., 333.

Cases cited and distinguished: Miller v. Miller, 91 N. Y., 315; Ross v. Ross, 129 Mass., 243; Dayton v. Adkisson, 45 N. J. Eq., 603; Williams v. Kimball, 35 Fla., 49; Ewing v. Sneed, 5 J. J. Marsh (Ky.), 459; Lingen v. Lingen, 45 Ala., 410; Harris v. Harris, 85 Ky., 49; Leonard v. Braswell, 99 Ky., 528; In re Waesch's Estate, 166 Pa., 204; Doe v. Vardill, 5 Bar. & Cr., 438; Jones v. Jones, 234 U. S., 618.

3. **DESCENT AND DISTRIBUTION.** "Inheritance." What law governs. "Natural right."

The State possesses the power to prescribe the laws under which property within the State may descend, and may preclude any other mode or law of descent, and, being the sovereign of the soil, the policy of its laws as to the descent of real property is paramount to that of the legal *status* of persons coming from foreign countries in case of a conflict of laws; "inheritance" not being a "natural or absolute right," but purely a creature of statutory law governed by the *lex rei sitae*. (*Post*, p. 102.)

4. **SLAVES.** Persons born in slavery. Status. "Bastard."

A person born of parents while in a state of slavery is regarded as a bastard, as the state of bondage precluded the husband and wife yielding to each other the duty, fealty, and protection that the law requires, and because of incapacity to contract; it following necessarily there was no lawful issue, as there was no lawful marriage in such cases. (*Post*, p. 109.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Judge.

BYARS & CAPELL, for appellant.

RANDOLPH & RANDOLPH and B. F. BOOTH, for appellee.

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MR. JUSTICE FANCHER delivered the opinion of the Court.

Tom Pollard died intestate while a resident and citizen of Memphis, Shelby county, Tenn., March, 1910, the owner in fee simple of the west one-half of lot 29 of F. W. Smith's subdivision, on the south side of St. Paul avenue, in said city of Memphis, being property conveyed to him by deed of George W. King of date January 17, 1876.

Tom Pollard left surviving him his widow, Emma Pollard, who died about September 3, 1911. He left no issue.

This is a suit by Alice Cole to recover of defendant, Sir Charles Henry Taylor, the said lot of land.

The defendant claims title under a will of Emma Pollard. The complainant claims title as a sister of Tom Pollard.

It appears that Tom Pollard and Alice Cole were children of Jordan Pollard and wife, Frances Pollard, all of whom were persons of color, and were slaves prior to the emancipation. Jordan and Frances Pollard were married in accordance with the custom of slave marriages, in the State of Georgia many years before the Civil War. They lived together as husband and wife till the death of Jordan, about ten years ago, and Frances has since died.

Alice Cole is the sole survivor of this family; all her brothers and sisters having died without issue.

During the Civil War the family removed from Georgia to Alabama, from whence they returned after

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the close of the War to Georgia, but these dates are not fixed. Jordan and Frances and some of their children were moved to Mississippi about 1868.

Soon after the war either by constitutional or statutory enactment provisions were made by the States of Georgia, Alabama, Mississippi, Tennessee, and other Southern States establishing the *status* of negroes under slave marriages.

It is the insistence of the plaintiff that by the laws either of Georgia, Alabama, or Mississippi the slave marriage of Jordan Pollard and Frances Pollard was made valid, and their children legitimated to all intents and purposes; that, said Tom and Alice being legitimate under the laws of one or the other of these States, they are legitimate here, and, being so, the said Alice may inherit from her brother, Tom. The chancellor rendered a decree in accordance with this position, and permitted a recovery by the complainant, from which decree the defendant appealed to this court.

The statute of Tennessee on this subject has been before the court a number of times. This act declared that slaves who within the State had lived together as man and wife should be regarded as lawfully married, and that the children of such slave marriages should be legitimately entitled to an inheritance in any property heretofore acquired or that may be hereafter acquired by such parents to as full an extent as the children of white citizens are entitled by the laws of this State. This statute was properly construed as not extending any right of inheritance beyond the lin-

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eal descendants of parents. *Sheperd v. Carlin*, 99 Tenn., 64, 41 S. W., 340; *Carver v. Maxwell*, 110 Tenn., 75, 71 S. W., 752; *Jones v. Jones*, 234 U. S., 616, 34 Sup. Ct., 937, 58 L. Ed., 1502.

The statute of Georgia upon the same subject was approved March 9, 1866 (Acts 1865-66, p. 240), and is as follows:

“The general assembly of the State of Georgia do enact, that persons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless a man shall have two or more reputed wives, or a woman two or more reputed husbands. In such event, the man, immediately after the passage of this act by the general assembly, shall select one of his reputed wives, with her consent; or the woman one of her reputed husbands, with his consent; and the ceremony of marriage between these two shall be performed.”

Code of Georgia, 1911, section 2180, provides as follows:

“Every colored child born before the 9th day of March, 1866, is hereby declared to be the legitimate child of his mother; but such child is the legitimate child of his colored father only when born within what was regarded as a State of wedlock, or when the parents were living together as husband and wife.”

The supreme court of Georgia, in the case of *Williams v. State*, 67 Ga., 262, held that the object of the act of March 9, 1866, was to declare all people who had been slaves, and were then living as man and wife,

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really and to all intents and purposes as fully husband and wife as though they had been formerly married, and that, if they continued to live on the 9th day of March, 1866, being then free, such living together by them at that time should amount to the contract of marriage in the eye of the law, and thus it was made just as effectually the contract of marriage by them as if they had been always free and had been actually married.

A statute of Alabama passed on November 30, 1867, provided as follows:

“Section 1. Be it ordained by the people of the State of Alabama in convention assembled, That all such freedmen and women who shall now be living together as man and wife, shall be regarded in law as man and wife, and that the children of such connection, whether they be black or of mixed color, shall be and are hereby declared to be entitled to all the rights, benefits and immunities of children of any other class under the laws of Alabama.”

Code of Alabama 1907, section 3766, provides as follows:

“Slaves and free persons of color prior to the abolition of slavery in this State, and their descendants, are capable of inheriting or transmitting property, real, personal, or mixed, the same in all respects as white persons, where the ancestors lived together as man and wife under such circumstances as would constitute a valid marriage at common law. This section

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shall also apply to and govern all cases heretofore arising and to which it may be applicable.”

The constitution of Mississippi (section 22, art. 12), adopted in 1869, provides as follows:

“All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held, for all purposes in law, as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate; and the legislature may, by law, punish adultery and concubinity.”

The learned chancellor was of opinion that Tom and Alice Pollard (now Cole) were born in the State of Georgia prior to March 9, 1866, and had become and were at said time legitimate children of the said Jordan and Frances Pollard, and that therefore Alice could and did rightfully inherit as the only heir at law of Tom Pollard the lot or parcel of land, subject to the rights of the widow of Tom Pollard to homestead and dower. The position is that, being legitimate children, they have a right of collateral inheritance according to the Tennessee laws of descent. Our Tennessee law upon the subject, now firmly established by judicial construction, limits its own citizens occupying this same relationship born in slavery under slave marriage to direct inheritance from the parents. It was said in the case of *Sheperd v. Carlin*, supra:

“We are of opinion that, by the plain terms of this act, the right and power of inheritance is conferred only as to such property as may descend from parents,

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and that no right of collateral inheritance is conferred by the act. This was no doubt the intention of the general assembly, and is the clear meaning of the words of the act, which can admit of no other construction. A like construction has been placed upon statutes similar to the Acts of 1865-66 in other States ✓ *Tucker v. Bellamy*, 98 N. C., 31, 4 S. E., 34; *Jones v. Hoggard*, 108 N. C., 178, 12 S. E., 906, 907; *Williams v. Kimball*, 35 Fla., 49, 16 South., 783, 786, 26 L. R. A., 746, 48 Am. St. Rep., 238."

The court is asked in this case, on grounds of comity between the States, to adopt the laws of either Georgia, Alabama, or Mississippi, and to grant to ex-slaves coming from one or the other of these states a right of collateral inheritance which the legislature of our own State has refused to persons born of slave marriages in the State of Tennessee. The case of *Gregley v. Jackson*, 38 Ark., 487, is cited by the complainants' counsel. Slave parents and two children had lived in South Carolina. The husband died during slavery in that State. The mother and children were brought to Arkansas, and the mother died in that State in 1864. One of the children died in Arkansas in 1878, and the court held that his slave brother inherited his property. It was held that the Arkansas act legitimating the offspring of negroes cohabiting as husband and wife legitimized the said children, notwithstanding the parents were married and the children born in South Carolina. That case does not involve a question of

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conflict of laws nor any difference regarding the policy of the law as to inheritance by ex-slaves.

It is insisted that *Miller v. Miller*, 91 N. Y., 315, 43 Am. Rep., 669, is a case affording authority for the position of complainant. In that case the complainant was born in the kingdom of Wurtemberg, before the marriage of his parents, who afterward moved to the State of Pennsylvania, where the father became a citizen of the United States, and while domiciled there his parents were lawfully married, afterward moving to New York. The plaintiff's father owned real estate after he moved to New York and at the time of his death. The law of Pennsylvania provided that:

“In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of holy wedlock and cohabit, such child or children shall thereby become legitimated and enjoy all the rights and privileges as if they were born during wedlock of their parents.”

There was also a statute found in the laws of Wurtemberg of 1610 which provided:

“That whatever is declared in the foregoing title regarding the inheritance of children born in lawful wedlock shall be applicable also to such children as are begotten of two persons unmarried (but not too closely related for their betrothal or lawful conjugal cohabitation) and who first become legitimate by the subsequent marriage of their parents, shall be held equal to those children who are born in lawful wedlock as regards the rights of inheritance from its parents,

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brothers and sisters and their relatives as in all other respects.”

It was held that these acts legitimated the son, and conferred on him the right of inheritance of his father's property situated in New York. It was argued that, if the father had died in the State of Pennsylvania seized of real estate, no doubt would arise as to the claim, and the question was asked: Would he lose this right if the father moved out of the State of Pennsylvania and located in the State of New York? The court propounded the following query:

“Could he be legitimate in one State and illegitimate in another?”

Answering the question, the court said:

“Such a rule would render the right of inheritance sanctioned by the law of the State where he resided one of great uncertainty, and conflictive, and in many cases it would operate so as to produce great injustice.”

The court in that case quoted from Story on Conflicts of Law, section 93:

“That foreign jurists generally maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin.”

And further in the same section:

“It seems admitted by foreign jurists that, as the validity of the marriage must depend upon the law of the country where it is celebrated, the *status* or condition of their offspring as to legitimacy or illegitimacy ought to depend on the same law, so that if by the law

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of the place of the marriage the offspring, although born before marriage, would be legitimate, they ought to be deemed legitimate in every other country for all purposes whatever, including heirship of immovable property.”

Wheaton, in his Law of Nations, p. 172, was also quoted in that opinion, as follows:

“Legitimacy or illegitimacy are among universal personal qualifications, and the laws of the State featuring all of these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they may be resident. The general current of authority favors the doctrine that, where an illegitimate child has been legitimated by a subsequent marriage of its parents according to the laws of the State or country where the marriage takes place and the parents are domiciled, such legitimacy follows the child wherever it may go.”

Other authorities along the same line are cited by the complainant, and as a general proposition it should be admitted that in all cases this personal relation of the parties should be sustained, and, where by the laws of any civilized country a child is regarded as legitimate, that relationship should be sustained in any and all countries wherever he may travel. There is, however, another doctrine of the law, which is equally well settled, and which in some instances may qualify the rights flowing from this legal *status* of persons. That principle is that, as to the right of inheritance of property within a State, such State possesses the power and

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authority to prescribe laws under which that property may descend, and may preclude any other mode or law of descent. The State is the sovereign of the soil, and the policy of its laws in regard to the descent of real property should be considered paramount to that of the legal *status* of persons coming from foreign countries in case of a conflict of laws.

In the case of *Miller v. Miller*, supra, no provision of the New York law of descent was found to be inconsistent in policy with the right of this German citizen to inherit from his father.

A peculiar situation was presented in the slaveholding States of the Union just after the emancipation of slaves. Marriage among these slaves was dependent upon the consent of the master, and he could divorce them at will. Slaves were incapable of contracting, and therefore incapable of entering into the relationship of marriage. They could not own property except with the consent of their master and were incapable of inheriting property from each other. The emancipation of slaves and their rights growing out of the fourteenth amendment to the constitution of the federal government presented a sudden and radical change in the relationship of these people. In many instances they were very ignorant. It seems apparent from our own statute upon the subject that it was deemed unwise to recognize or grant unqualified inheritance among the negroes who had been slaves.) The relationship was often exceedingly doubtful, and the policy of our State was to limit the descent of property among such per-

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sons, only permitting it to descend from parent to child.

Under sections 1 and 2, ch. 40, Acts of 1865-66, all negroes, mulattoes, Mestizoes, and their descendants having any African blood in their veins were declared to have the right to make and enforce contracts, to sue and to be sued, to be parties and give evidence, to inherit, and to have full and equal benefits of all laws, etc.

Section 5 of that act contains the provision of our law which limits the right of inheritance by children of former slaves to property acquired by their parents. This provision contains no limitation of the personal relationship, and it does not contradict any provision of law legitimating such children. The first and second sections of the act are not mentioned in the opinions of this court, and these sections were not carried into the compilation of our laws. It is now argued that they confer the unlimited right of inheritance. We think not. These provisions are declaratory of the general *status* of negroes, and do not enlarge the limited right of inheritance of former slaves, as clearly expressed in the fifth section of the act. The Georgia statute also contains provisions identical with the first and second sections of our act. It may be considered that under the laws of Georgia or Alabama, as the case may be, Tom and Alice Pollard were the legitimate children of Jordan and Frances Pollard. Nevertheless, while legitimate, if they had been born and had always lived in Tennessee, there could be no inheritance be-

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tween the brother and sister. Our State has seen proper not to allow this inheritance for reasons regarded by it sufficient. Thus the policy of our law is made manifest. Will the courts out of comity alone permit an inheritance by persons in this peculiar relationship, coming from other States, that it will not grant to former slaves, natives of this State? The law applicable to this peculiar condition is well stated by Rodgers on Domestic Relations. This author says:

“The general rule is the laws of inheritance will be controlled by the local laws of the State or country where the property to be inherited is situated, while the laws fixing the *status* of the person inheriting will be controlled by the laws of the State of the domicile of such person. That is, a person who is legitimate by the laws of the State of domicile is not necessarily legitimate by the laws of the State where the property he is to inherit is located. And if he is not legitimate by the laws of the place where the property is, he cannot inherit, though he be legitimate, by the laws of his domicile, and might inherit the same property if it were located in such places of domicile.” Rodgers on Domestic Relations, section 596.

This author holds that the laws of one State conferring or denying legitimacy have no extraterritorial force, and that one State is in no sense bound to recognize the laws of another State upon the subject. The author recognizes that his position is stoutly denied in *Miller v. Miller*, 91 N. Y., 315, 43 Am. Rep., 669, in *Ross v. Ross*, 129 Mass., 243, 37 Am. Rep., 321, and in

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Dayton v. Adkisson, 45 N. J. Eq., 603, 17 Atl., 964, 4 L. R. A., 488, 14 Am. St. Rep., 763, all of which are cited by complainant in this case. He cites the following authority for his position: Story on Conflict of Laws, section 483; *Williams v. Kimball*, 35 Fla., 49, 16 South., 783, 26 L. R. A., 746, 48 Am. St. Rep., 238; *Ewing v. Sneed*, 5 J. J. Marsh. (Ky.), 459; *Lingen v. Lingen*, 45 Ala., 410; *Harris v. Harris*, 85 Ky., 49, 2 S. W., 549; *Leonard v. Braswell*, 99 Ky., 528, 36 S. W., 684, 36 L. R. A., 707; *In re Waesch's Estate*, 166 Pa., 204, 30 Atl., 1124; *Doe v. Vardill*, 5 Bar. & Cr., 438.

Mr. Rodgers recognizes that the doctrine laid down in *Miller v. Miller*, *Ross v. Ross*, and *Dayton v. Adkisson*, supra, is the general rule, and may perhaps, on principle at least, be regarded as the universal rule where the public policy of the State is not invaded by such laws conferring legitimacy. But, where there is a conflict of policy in this regard, the State's right in this respect is maintained by him for the following reasons:

“As to the right of inheritance of property within a State, such State certainly possesses the power and authority to prescribe laws by and under which that property may descend, and may preclude any other mode or law of descent. When this is done, the bastard who has been legitimated in a foreign country or State, but who is still a bastard, and precluded, by reason of such fact, from inheriting property within the State where the same may be situated, it would seem to be proper to hold that such bastard cannot inherit

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property in the State of the *locus* of the property. If he could do so, it would be tantamount to permitting a foreign State or country to dominate, in a sense, the policy of a State with respect to the right of inheritance of property within the jurisdiction exclusively of the courts of such State, and impose on such courts the duty of bowing in obedience to the laws of a foreign country, enacted in positive and hopeless conflict with the laws of the place of the property. Property within a State is under the dominion and control of the laws of such State. No laws of a foreign State can have the extraterritorial force claimed by the rulings which confer upon a bastard the right to inherit property in a State in which he is not recognized by law as a legitimate person capable of inheriting. The policy of a State in this respect may be based on the idea that it is best for all the citizens of the State that bastards, as defined by law, shall have no rights within such State not conferred by the laws of that State. If such be true, it would certainly seem reasonable to conclude that no other State would have the right to dominate a different course or public policy. A foreign State could no more do this than it could say that property situated in another State shall not be taxable in such State because the owner may live in a different State. Were this the case, one State could seriously interfere with the revenue, and incidentally the machinery, of the State government of another, a thing which no State would, for an instant, tolerate. The property is subject to taxation in the State of its location. It is, upon

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analogy and reason, likewise subject to the laws of descent of such State. That the authorities are far from harmonious on this point must be conceded, and that there is forcible argument to the contrary is also frankly admitted. But it seems that the better reason sustains this contention." Rodgers on Domestic Relations, section 597.

Mr. W. C. Rodgers, the author of this work, is a lawyer of Nashville, Arkansas, and has well stated the question, in view of social conditions and laws affecting Tennessee.

When these negroes came to Tennessee they had been declared legitimate, and they came with the *status* of legitimate children under the laws of Georgia, Alabama, or Mississippi, but this relationship must yield to the policy of our own law in its control of the descent of property situated within its borders.

Tennessee has seen proper not to grant the right of collateral inheritance to such people, had their parents lived together as husband and wife in this State. It cannot be expected that the courts out of mere comity shall grant to citizens coming from other States a right which this State does not grant its own citizens. Inheritance is governed by the *lex rei sitae*. This is not a natural or absolute right, and purely a creature of statutory law.

The opinion of this court in *Finley v. Brown*, 122 Tenn. (14 Cates), 335, 125 S. W., 259, 25 L. R. A. (N. S.), 1285 (Chief Justice Neil), recognizes the authority of cases holding in favor of recognition by one State

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of legitimation by subsequent marriage of parents by virtue of the laws of the State or country where the marriage took place, as against opinions holding the contrary. But that case was not one where the recognition of the laws of another State or country conflicted in policy with that of our Tennessee laws on the subject./ In that opinion it was recognized that this State will not by comity adopt the laws of another State opposed to our own institutions or policy.

Mr. Justice Lurton, in *Jones v. Jones*, 234 U. S., 618, 34 Sup. Ct., 938, 58 L. Ed., 1500, says:

“If one claim the right to succeed to the real property of another as heir, and his right is denied because he must trace his pedigree or title to or through an alien, a bastard, or a slave, the question is one to be determined by the local law. *Cope v. Cope*, 137 U. S., 682, 11 Sup. Ct., 222, 34 L. Ed., 832; *Levy v. McCartee*, 6 Pet., 102, 8 L. Ed., 334; *Blythe v. Hinckley*, 180 U. S., 333, 21 Sup. Ct., 390, 45 L. Ed., 557.”

Persons born of parents while in a state of slavery are regarded as bastards, as the state of bondage precluded the husband and wife yielding to each other the duty, fealty, and protection that the law requires, and because of incapacity to contract. There being no lawful marriage in such cases, it followed necessarily there was no lawful issue. *Rodgers on Domestic Relations*, section 598.

It therefore follows that while, as a general proposition, legitimacy attaching in one jurisdiction follows the person wherever he may go, yet this rule is qualified to

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the extent that it must yield to the policy of the State of his adoption, so far as the right of inheritance is concerned/ The unquestioned right of a State to prescribe the manner in which real estate within its boundary may descend must not be lost sight of.

This right should be guarded, and in a doubtful case of conflict of laws should be resolved in favor of the State where the property is located. Tom and Alice Pollard were born as slaves, and therefore were not legitimate children. Their subsequent legitimation, wherever it may have occurred, must yield to the statute of Tennessee limiting the right of such persons to inherit only from the parent. To hold otherwise would discriminate in favor of nonresidents coming to this State as against the policy of our own law, and to confer a right upon them not common to natives of the State. It might open the door for grave dangers on other phases of the law, as against the social organization and wise and sound public policy of our own State.

The decree of the chancellor is reversed, and the cause will be remanded, to the end that the premises in controversy be restored to the possession of the defendant, the same now being held by a receiver, and all accrued rents will likewise be paid to him.

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NAPIER v. CHURCH *et al.**(Jackson. April Term, 1915.)***1. WILLS. Probate. Legitimacy of contestant.**

Where the proponent of a will, upon petition to contest as heir of decedent, alleges the illegitimacy of the contestant, the determination of such contestant's right is the initial inquiry, separate from and preliminary to the contest itself. (*Post*, p. 115.)

Cases cited and approved: *Shaller v. Garrett*, 127 Tenn., 665; *Cowan v. Walker*, 117 Tenn., 135.

2. MARRIAGE. Slaves. Effect.

Since slaves could not contract, they could not enter into a valid marriage, and from their unions no civil rights could spring, so that the issue were incapable of inheriting property, the marriage being a mere cohabitation, subject to termination at the will of the master. (*Post*, p. 118.)

3. DESCENT AND DISTRIBUTION. Legitimacy. Controlling law.

While, as to the right of inheritance, the *status* of a party as to legitimacy depends upon the law of the domicile of the parents, nevertheless where such State is foreign to that of the decedent at the time of his death, where his property is situated, the laws of such State, as to the party's right of inheritance, are not controlled by those of the foreign State, since every State determines for itself what classes of persons may inherit property owned by citizens in the State at the time of their death. (*Post*, p. 118.)

4. SLAVES. Issue of slave marriage. Statutory right to inherit.

The right of any issue of a slave marriage to inherit depends solely upon statute, since before emancipation no right of inheritance could flow from such a union. (*Post*, p. 119.)

Case cited and approved: *Jones v. Jones*, 234 U. S., 619.

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5. SLAVES. Slave marriage. Validation. Louisiana law. Statute.

Under act of 1868 of the State of Louisiana (Act No. 210 of 1868), providing for the validation of slave marriages, such a validation might be effected by a declaration of marriage before a notary public, while the courts of that State adopted another rule that such marriages might be validated by mere cohabitation as man and wife after emancipation, although there is no decision that a mere meeting of the parties thereafter, without resuming the relationship of marriage, effects a validation. (*Post*, p. 119.)

Cases cited and distinguished: *Girod v. Lewis*, 6 Martin O. S. (La.), 559; *Pierre v. Fontenette*, 25 La. Ann, 617; *Succession of Pierce*, 30 La. Ann., 1168; *Ross v. Ross*, 34 La. Ann., 860; *Succession of William Thomas*, 1 Ct. App., 124; *Johnson Heirs v. Raphael*, 117 La., 967; *Succession of Walker*, 121 La., 865.

6. SLAVES. Slave marriage. Validation under foreign law. Comity. Certainty of law.

Where it is urged that the issue of a slave marriage is legitimate, on account of the validation of the marriage under the laws of a foreign State, to enable such issue to inherit property here, there must be some clear and convincing law of the foreign State, either by statute or court decision, to warrant the court in declaring legitimacy. (*Post*, p. 124.)

7. SLAVES. Validity of slave marriage. Statute.

Under Acts 1865-66, ch. 40, providing that persons of color have the right to make and enforce contracts, sue and be sued, be parties and give evidence, to inherit, and to have the benefit of all laws and proceedings for the security of person and estate, and under Shannon's Code, sec. 4179, providing that all free persons of color who were living together as husband and wife in this State while in a state of slavery are man and wife, and their children legitimately entitled to an inheritance in any property of such parents to as full an extent as the children of white citizens, the issue of a slave marriage, contracted and terminated before emancipation in Louisiana, the parties to which never lived together in this State, was not legitimized

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to inherit from the father, a citizen here at the time of his death. (*Post*, p. 124.)

Cases cited and approved: *Shepherd v. Carlin*, 99 Tenn., 64; *Carver v. Maxwell*, 110 Tenn., 75; *Jones v. Jones*, 234 U. S., 616.

Code cited and construed: Sec. 4179 (S.).

8. SLAVES. Slave marriage. Validation. Statutes. "Living together."

Under Acts 1865-66, ch. 40, as amended by Acts 1887, ch. 151, Shannon's Code, sec. 4183, making the Code provision that all free persons of color living together in this State as husband and wife while in a state of slavery are man and wife, and their children legitimate and entitled to inherit, applicable to persons of color "living together" as man and wife in other States, who have moved to this State, the issue of a slave marriage, contracted and terminated previous to emancipation in the State of Louisiana, the parties never thereafter having moved to this State, was not legitimized to inherit from the father, dying a citizen of this State, where the father, who had been a body servant of a steamboat captain, had visited his slave wife in New Orleans only occasionally, when his master's boat was in port there, since the words "living together" imply a habitat or place of domicile, where both parties reside or have their home. (*Post*, p. 125.)

Acts cited and construed: Acts 1887, ch. 151.

Code cited and construed: Secs. 4179, 4180, 4182, 4183.

9. CONSTITUTIONAL LAW. Equal protection of law. Slave marriage. Legitimacy of issue.

The court was not forbidden by Const. U. S. Amend. 14, to hold that, for purposes of inheritance, the issue of a slave marriage contracted in Louisiana and there terminated before emancipation, was illegitimate. (*Post*, p. 128.)

Cases cited and approved: *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.), 460; *Hall v. U. S.*, 92 U. S., 27; *Jones v. Jones*, 234 U. S., 619. 132 Tenn.8

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been granted, and the case has been argued at the bar of this court upon the assignments of error. .

The whole question involved is whether or not Laura C. Napier is a legitimate child of the said Robert R. Church. This question involves a construction of the laws of the States of Louisiana and Tennessee on the subject of the right of children of former slaves to inherit property.

Robert R. Church was a slave and body servant of Capt. Charles B. Church, who, prior to the Civil War, was the master of a number of steamboats running the waters of the Mississippi river between the cities of New Orleans, Memphis, and St. Louis. He was a resident and citizen of Memphis, Tennessee, and consequently that was the place of residence of his slave, Robert R. Church. The latter accompanied Capt. Church on his regular trips from Memphis to New Orleans, and would accompany his master to and from the boat and generally wherever he went.

About the year 1857, Robert R. Church intermarried in New Orleans with a slave woman by the name of Margaret Pico, according to the custom of slave marriages, and with the consent of his master, as well as well as with the consent of the master of Margaret Pico. When the boat would land at New Orleans, Capt. Church would visit at the home of the Pico family, who were friends of his. The boat would remain at New Orleans only a short time, some few days on each trip. After this slave marriage, when the boat would land at New Orleans, Robert R. Church would visit Mar-

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garet Pico, and there was born to this slave marriage at New Orleans before the Civil War the said Laura. Soon after the birth of Laura, Capt. Church ceased to run the river, and Robert Church was retained permanently by him in Memphis, thereby entirely separating him from his slave wife, which by the custom and laws of the times produced a divorce.

In the year 1862, Robert R. Church again married, with the consent of his master, according to the custom of slave marriages, at Memphis, in the presence of Capt. Church and the owner of Louise Ayers, the slave woman whom he married. Margaret Pico also married again about 1865.

After the emancipation, probably about 1866, Robert R. Church made a visit to New Orleans, and called upon his former wife, he then being married to Louise Ayers, and Margaret being married to another man, and requested of his former slave wife that he be allowed to take their daughter Laura, and care for her and place her in school. The mother of the child agreed to this, and in a year or so the negro father again returned to New Orleans and made arrangements for the contestant to be sent to him at Memphis. He thereupon arranged with an old steamboat friend of his to bring Laura to him, which was done. She was placed by Church in Fisk University at Nashville, where she remained during the academic year 1868-69, and registered there as a student as Laura Church of Memphis. Afterwards she attended school at New Orleans, and married in 1878, continuing her residence

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in New Orleans. She and the said Robert R. Church corresponded occasionally. She was never made a member of the household of Robert Church, but resided at New Orleans, St. Louis, and other places. There was never any cohabitation between Margaret Pico and Robert Church after their separation prior to the Civil War. Robert R. Church was finally divorced from his Memphis wife and married again. There were born to these two marriages in Tennessee four children. Robert Church left a widow at the time of his death. His estate is very large for that of a colored man, amounting to probably \$600,000.

These slave marriages were peculiar, being dependent upon the consent of the master, and he could divorce them at will. Slaves could not contract, and therefore were incapable of entering into relationship of a valid marriage. No civil rights could grow out of a slave union and slaves were incapable of inheriting property from each other. The slave marriage was a mere cohabitation, with some degree of regularity to give it a sense of decency, and subject to be absolutely terminated at the will of the master at any time. No right of inheritance could grow out of a slave union. Since the war between the States, however, various statutes have been enacted in the former slaveholding States of the Union, by which with limitations children of these slave unions were enabled under certain conditions to inherit.

We will now inquire as to what the law of Louisiana was with respect to such rights of inheritance of such

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persons in order to determine whether there be any inheritable blood in Laura C. Napier. Preliminary to this question, it may be said that the *status* of the parties as to legitimacy will depend as a rule upon the law of domicile. But every State determines for itself as to what class of persons may or may not inherit property owned by citizens in the State at the time of their death. Each State makes its own laws of descent and distribution according to its own sovereign will, and such laws are uncontrolled and unaffected by the laws of any State where any person may be domiciled who might have an interest. So, it is important to determine whether there be any right of inheritance in this contestant, the child of a slave marriage in Louisiana.

Before the emancipation, no right of inheritance could flow from such a union, and if any right now exists it must be determined by the statutes of Louisiana and the statutes of Tennessee. See Rodgers on Domestic Relations, sections 596, 597; Story on Conflict of Laws, section 483; *Jones v. Jones*, 234 U. S., 619, 34 Sup. Ct., 937, 58 L. Ed., 1500, and cases there cited.

There are only two statutes upon the subject in the State of Louisiana. Article 182 of the Civil Code of 1825 is as follows:

“Slaves cannot be married without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contract.”

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This remained the law in the State of Louisiana until the passage of the act of 1868, No. 210, which provided as follows:

“That all private or religious marriages contracted in this State at any time previous to the passage of this act shall be deemed valid and binding and as having the same force and effect as if the said marriages had been contracted with all the formalities and forms prescribed by law then existing; provided, that at any time within two years from the date of this act the parties having contracted such private or religious marriages shall by an authentic act before a duly commissioned notary public, if they reside in the State, . . . make a declaration of their marriage, the date on which it was contracted, the names, sex and ages of the children born of said marriages, acknowledging said children as their offspring.”

The courts of Louisiana adopted another rule by which slave marriages might be validated in addition to that enacted by statute, holding that it was not necessary for the parties to make a declaration of marriage before a notary public, but that slave marriages could be validated by the parties cohabiting as man and wife after emancipation. But no case has been found from the authorities of that State holding that there could be a validation of a slave marriage by a mere oral recognition or statement by the parties after emancipation that they had been married during slavery. The Louisiana cases on this subject are the following: *Girod v. Lewis*, 6 Martin O. S. (La.), 559; *Pieere v*

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Fontenette, 25 La. Ann., 617; *Succession of Pierce*, 30 La. Ann., 1168; *Ross v. Ross*, 34 La. Ann., 860; *Succession of William Thomas*, 1 Ct. App., 124, 114 La., 693, 38 South., 519; *Johnson Heirs v. Raphael*, 117 La., 967, 42 South., 470; *Succession of Walker*, 121 La., 865, 46 South., 890.

It was held by these authorities that slave marriages were binding in morals, but that they did not produce any civil effects. Hence the parties when emancipated were at liberty to withdraw or continue their relations, and it appears that the ratification which was recognized by the Louisiana courts was a ratification by cohabitation after the slaves were freed. The law of Louisiana gave them the right to legalize their former relations and legitimize their offspring by formal declaration before a notary public or a continuation of cohabitation as man and wife after they became competent to act upon being emancipated.

In the case of *Succession of Walker*, 121 La., 865, 46 South., 890, the court said:

“Pretermittting the question whether living together and cohabitation after the emancipation of the parties is absolutely essential to the ratification of such marriage, it is clear that ratification required some sort of affirmative action” concurred in by both minds “and that, where the parties were separated before their emancipation and never met afterwards, it could not have resulted from their mere silence, and still less where, by his or her conduct, one of the parties had indicated an intention of establishing relations inconsist-

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ent with those established by the marriage to be ratified. In the instant case the evidence fails to satisfy us that there was ever any attempt or intention on the part either of Henry or Henrietta W—— to maintain their marriage relation after they were emancipated.”

A ratification by cohabitation of the parties was impossible so far as Robert R. Church and Margaret Pico were concerned after they were emancipated, because Robert Church was married to another woman, and Margaret Pico was married to another man, and hence they were incapable of entering into the former relationship.

As to what consent was necessary to produce a ratification of a slave marriage has not been definitely determined by the Louisiana courts, but none of the cases go to the extent of holding that a mere meeting of the parties after emancipation and talking over their former relations or about their child or children, without again resuming the relationship of marriage, could have the effect to validate. Robert R. Church after the war went to New Orleans and called upon his former slave wife, and they talked about their child, but this was not a ratification of the marriage. If one be without the capacity to contract at the time of the doing of any particular thing, in order that he may thereafter ratify and confirm such act, he must at that time be possessed of the capacity to ratify. In the case at bar, there was neither the intention nor the capacity of the parties to renew their former relationship.

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It is insisted by counsel for the petitioner, that the opinion in the case of *Succession of William Thomas*, supra, affords authority for their position that there was a ratification by Robert Church and Margaret Pico in the meeting at New Orleans and recognizing that the child Laura was their child, and they insist that that involved also a recognition of their former marriage.

In the case of *Succession of Thomas*, the slave husband and wife had been separated before emancipation. The wife and her children had been carried to Texas, leaving the husband in Louisiana with his master. After the war the woman returned to Louisiana, made search for her former husband, found him, and remained with him and her children at her husband's home at least two days, and then by reason of the fact that he was living in open concubinage with another woman, there was a separation and division of the children. The court makes it clear in that opinion that the former relationship was resumed, and says, "Then came a separation and division of the children." The court goes on to say:

"The husband and wife were brought together again; the wife and her children remained under the same roof with her husband for several days; the wife refused to remain longer owing to the presence of her husband's concubine; the husband making no denial of the marriage nor repudiating same, but on the contrary, received his wife under his roof as his wife, recognized his children as his lawful offspring and subsequently

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consenting to a separation, each taking and caring for an equal number of children.”

From these acts of recognition and cohabitation the court held there was a ratification of the marriage and hence a legitimation of the children.

If we are to adopt the law of Louisiana upon the subject of the *status* of these parties socially, and this must be done as a matter of comity if at all, then we should find some clear and convincing law of that State either by statute or the clear and unmistakable holding of the courts, before we would be justified in doing so. We find no such law in Louisiana.

We will now turn to the Tennessee laws upon the subject. The first statute passed in Tennessee validating slave marriages or legitimatizing the issue of such unions is the statute of 1865-66, chapter 40. The second section of that act is in pursuance of the Bill of Rights and in recognition of the fourteenth amendment to the federal constitution, and provides:

“That persons of color have the right to make and enforce contracts, to sue and be sued, to be parties and give evidence, to inherit, and to have full and equal benefits of all laws and proceedings for the security of person and estate.”

It is insisted that this section of the act recognizes the right of inheritance among slaves generally, and would embrace the right of Laura C. Napier to inherit from Robert R. Church. We think not. That section is one of a general nature, recognizing that there shall be no distinction between white persons and persons of

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color, so far as civil rights are concerned, but it does not go back and make legal and valid these former slave marriages so as to produce civil results therefrom. Section 5 of said act, which is carried into Shannon's Code, section 4179, expresses the legislative enactment in that statute with respect to inheritance by children of former slaves. It is as follows:

“All free persons of color who were living together as husband and wife in this State while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may hereafter be acquired, by said parents, to as full extent as the children of white citizens are entitled by the laws of this State.”

This section of the act does not apply here because it is restricted to slaves who had been living together within the State as man and wife. This is patent from the face of the act itself and is the interpretation heretofore given by the courts. *Shepherd v. Carlin*, 99 Tenn., 64, 41 S. W., 340; *Carver v. Maxwell*, 110 Tenn., 75, 71 S. W., 752; *Jones v. Jones*, 234 U. S., 616, 34 Sup. Ct., 937, 58 L. Ed., 1502.

But it is said that the legislature of Tennessee has extended the provisions of law on this question by the Act of 1887, chapter 151, which is carried into Shannon's Code by section 4183. This act is as follows:

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“An act to amend the laws of descent and distribution, and to amend sections 3285, 3286, 3287, and 3288 of the Revised Code.

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that section 3285 of Milliken & Vertrees' Code be so amended as to include in its provisions persons of color, who have been living as man and wife in other States, and who have moved to this State; and that sections 3286, 3287 and 3288 of Revised Code be applied to such persons and their issue, whether born in this State or elsewhere.”

The sections 3286, 3287, 3288 referred to above as sections in Milliken & Vertrees' Code are the same as sections 4180-4182 in Shannon's Code. Those three sections have no bearing upon the question under consideration, and it must be determined by the first clause of this act.

If we may look to “section 3285 of Milliken & Vertrees' Code,” which is not really a Code, but a compilation of laws, to determine the law here amended, we will find that this first section 5 of the Act of 1865-66 above referred to, or section 4179 of Shannon's Compilation above copied, provides that:

“All free persons of color who were living together as husband and wife in this State while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may . . . be acquired, by said parents, to as full an extent as the children of white citizens . . . of this State.”

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So that this amendatory act of 1887 if it may be referred to any law merely includes in the provisions above quoted "persons of color who have been living together as man and wife in other States who have moved to this State."

The statute sought to be amended clearly does not apply to these parties because Robert R. Church and Margaret Pico did not live together as man and wife in this State. This amendment we think cannot apply because it only embraces those persons of color who have been living together as man and wife in other States and who have moved to this State. Robert R. Church and Margaret Pico did not live together as man and wife in another State. The words "living together" imply a habitation or place of domicile where they both reside or have their home. The home of Robert Church was with his master, Capt. Church, at Memphis. He did not live in New Orleans, where Margaret Pico lived with her master and mistress. The domicile of the slave was that of his master. He only visited his slave wife at periods when the boat would land at New Orleans on its trips from Memphis, and then could only visit her at the convenience of his master, and the boat would only stay at New Orleans for a few days at a time. Then again, Robert Church and Margaret Pico did not move to this State. Margaret Pico never did move to Tennessee, and Robert lived here from the beginning. So, very clearly, the petitioner does not come within the provisions of this amen-

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datory statute, if we may concede it to be a valid and constitutional act.

Four of the members of the court of civil appeals took the view here indicated, but the writer of the opinion, Mr. Justice Higgins, did not concur in that view. He thought that the legislature in passing this act intended to embrace a case such as is here presented. We think the majority of that court were correct in their view on this subject. That court by unanimous opinion concluded that this act of 1887 was unconstitutional on grounds set forth in the opinion. That question had not been raised by counsel before the court, and we do not see proper to discuss the constitutionality of the act, for the reason that we deem it entirely unnecessary.

There only remains one other question raised on this petition to be here determined. It is insisted that any view of the law inconsistent with petitioner's contention in which her right of inheritance may be denied as a free person of color would be violative of the fourteenth amendment to the federal constitution, providing for equality before the law, and the Civil Rights Statute.

The denial of the right of Laura C. Napier to inherit as the legitimate child of Robert R. Church is in no sense a violation of any of the rights granted by the fourteenth amendment and the civil rights statutes. The State has the undoubted right to prescribe those persons who shall and who shall not inherit property within its boundaries under such regulations as pro-

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vided in these laws applying to children of former slaves. There is no law or constitutional provision requiring the courts of this State to recognize as legitimate the issue of any irregular union, whether they be white or black.

It is within the power of the State to make just discrimination as to what class of persons may inherit. Tennessee has passed laws legitimating the offspring of slave marriages where the parents lived in this State as husband and wife while in a state of slavery, and if the act of 1887 be constitutional, then applying to the children of former slaves where the parents lived in another State as husband and wife and removed to this State. There is no unjust discrimination in this. The issue of these slave marriages could not inherit at all under their former *status*, and cases of this kind are similar to statutes of legitimation and adoption whereby persons may inherit property.

There is no discrimination in this as between white and colored persons. These laws were passed in order to better the conditions of these unfortunate people. The provision of our law requiring a residence in this State by the husband and wife has a wise purpose behind it. It would be an easy matter for designing persons to work up proof of slave marriages during the old days of slavery, and great imposition might be practiced but for the requirement that the parties shall live together as husband and wife after emancipation. The lawmaking bodies, as well as the courts of Louisiana and Tennessee, have doubtless had this danger in view.

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We are not inclined to loosely, by judicial construction, admit persons to such relationships who do not come within the rules defined by the legislature and by the courts.

The former slaveholding States have always appreciated the unfortunate situation of these people who formerly served their masters so faithfully and well. Certainly there has been no intention to discriminate against them in any respect. The statutes have been passed as humane and wholesome laws for their own benefit, and they have been favored by the enactments. We do not consider that this question is an open one. *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.), 460, 22 Am. Dec., 41; *Hall v. U. S.*, 92 U. S., 27, 23 L. Ed., 597; *Jones v. Jones*, 234 U. S., 619, 34 Sup. Ct., 937, 58 L. Ed., 1500.

We find no error in the result reached by the court of civil appeals, and its judgment is affirmed.

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TATE, Sheriff, *v.* STATE, *ex rel.* RAINE.
RAINE *v.* STATE.

(*Jackson.* April Term, 1915.)

1. CONTEMPT. Publications relating to pending litigation. Power of court.

It is the inherent right and power of courts to punish for contempt publishers of newspapers who, pending the trial of a case print matter for public circulation which is calculated to impede, embarrass, or affect the orderly trial and disposition of the case being heard. (*Post*, p. 136.)

Cases cited and approved: *Shaller v. Garrett*, 130 Tenn., 473; *Murrell v. Rich*, 131 Tenn., 378; *State v. Galloway*, 45 Tenn., 326; *Scott v. State*, 109 Tenn., 390; *State v. Morrill*, 16 Ark., 384; *Cartwright's Case*, 114 Mass., 230; *Tinsley v. Anderson*, 171 U. S., 101.

Cases cited and distinguished: *Regine v. Wilkinson*, 41 U. C. Q. B., 47; *Rex v. Parke*, 2 K. B., 432; *In re Shortridge*, 99 Cal., 526; *Patterson v. Colo., etc. Attorney-General*, 205 U. S., 454; *Globe Newspaper Co v. Commonwealth*, 188 Mass., 449; *Graham v. Williamson*, 128 Tenn., 721.

Code cited and construed: Sec. 5918 (S.)

2. CONTEMPT. Publications relating to pending litigation. Power of court. Statute.

Under Shannon's Code, sec. 5918, regulating the power of the courts to punish for contempts, where, during the pendency of a widely followed will case, the defendant's newspaper published a scare-head article, relating to the withholding from evidence by the court, after the jury had retired, of affidavits by a subscribing witness to the will, which article suggested that such subscribing witness had gone over to the contestants, which must have come to the knowledge of the jury, and so was calculated to destroy the effect of his previous testi-

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mony favoring the will, such publication was within the statutory power of the court to punish as a contempt. (*Post*, p. 140.)
Code cited and construed: Sec. 5918 (S.).

3. CONTEMPT. Publications relating to pending litigation. Power of court. Violation of order.

The power of the court to punish for contempt one publishing, during the pendency of litigation, matter tending to hinder or embarrass the court in the discharge of its functions is not dependent upon any preliminary order forbidding such publication being served by the court upon the publisher, since one violating the law becomes amenable to punishment irrespective of previous warning. (*Post*, p. 143.)

Cases cited and approved: *Ex parte Foster*, 44 Tex. Cr. R., 423;
In re Shortridge, 99 Cal., 526.

Case cited and distinguished: *Patterson v. Colorado*, 205 U. S., 454.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County, to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
WALTER MALONE, Judge.

G. T. FITZHUGH and CARUTHERS EWING, for plaintiff.

W. G. CAVETT and T. K. RIDDICK, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

These two cases involve a contempt proceeding against Gilbert D. Raine, publisher of the News-Scim-

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itar, a Memphis newspaper. He was adjudged guilty of contempt by one of the circuit courts of Memphis. This order was reversed by the court of civil appeals, and the cases are before us on petitions for *certiorari*. These cases came into this court near the close of the last term. They were heard along with other cases (*Shaller v. Garrett*, 130 Tenn., 473, 171 S. W., 486, and *Murrell v. Rich*, 131 Tenn., 378, 175 S. W., 420), involving the validity of the will of Caroline Cloth. The questions raised in the contempt proceeding were insufficiently presented at the last term, owing to a lack of time. Inasmuch as these questions were of importance and all parties interested in their correct determination, the court thought it proper to carry the matter over until the present term. It has now been fully argued before us.

During the trial of the case of *Murrell v. Rich*, in the circuit court of Shelby county, division 3, which involved the validity of the will referred to, and which was a case exciting much public interest, certain affidavits were filed in the cause after the proof was all in and argument had begun. These affidavits were filed by J. H. Lenow, a subscribing witness to the will which was being contested, and J. H. Malone, of counsel for the contestants. Certain matters were presented in the affidavits upon which it is unnecessary to comment, and it was requested that the hearing of evidence be reopened.

These affidavits were brought before the court during the absence of the jury. The court declined to per-

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mit a reopening of the case and the introduction of any further testimony, and, in order to avoid any improper influence upon the jury, took steps to prevent the contents of such affidavits from coming to the knowledge of the jury.

The court addressed an order to the publishers of newspapers in the city of Memphis, instructing them not to make any publication that would directly or indirectly furnish information as to the affidavits. This order was served on the newspaper men, but on the same day the News-Scimitar, an afternoon paper, printed an article which brought about this proceeding. The article was printed under a headline which extended entirely across the front page of the paper as follows:

“Court Orders News Suppressed.”

Then followed a subheading in large type:

“Injunction Served on the News-Scimitar Requiring that Mysterious Affidavit be Withheld from Public—Document Locked in Vault.”

Below these headlines appeared the following news story:

“Mysterious affidavits pertaining to the Cloth will case, which were filed Monday morning in the office of the circuit court clerk, resulted in the issuance of an injunction, by Judge Pittman, who is trying issues of the ‘missing pages’ will of the late Mrs. Caroline Cloth. The order restrains any of the newspapers publishing in the city of Memphis from publishing directly

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or indirectly, any information pertaining to such matters.

“The nature of the affidavits remains a profound secret. On the order of Judge Pittman they were placed in a vault in the circuit court clerk’s office, and were not accessible to the News-Scimitar Monday. As arguments in the ‘missing pages’ will case had already been started, and testimony concluded three days ago, the affidavits were not admitted as evidence before the jury.

“‘J. H. Lenow,’ mentioned in Judge Pittman’s injunction, is supposed to have been a subscribing witness to the ‘missing pages’ will. Attorney J. H. Malone, who filed the affidavits, represents counsel opposing the will.

“It is understood that Judge Pittman’s order to enjoin publication of the affidavits was done with the intention of preventing an exposure of the document’s allegations, which were given free circulation on the streets Monday by gossipers. Both sides agreed to the ruling, and the affidavits were accordingly ordered withheld from the public.”

After this publication the court cited Gilbert D. Raine for contempt. He appeared and acknowledged the service of the order referred to and accepted full responsibility for the publication in his paper. He claimed that he was within his constitutional rights in printing the article, and that the court had no power to prevent such a publication and was without power to punish him therefor.

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Upon consideration of the matter the court imposed a fine and a jail sentence. The respondent later sued out a writ of error to review this action of the court.

This writ of error is styled “Gilbert D. Raine v. State of Tennessee.” *T. G. Tate v. State of Tennessee ex rel. Gilbert D. Raine*, was a *habeas corpus* proceeding instituted by the respondent in the same matter. These two cases have been consolidated and heard together, and what will be said herein applies equally to both cases.

There can be no doubt of the right of courts to punish for contempt publishers of newspapers who, pending the trial of a case, print matter for public circulation which is calculated to impede, embarrass, or affect the orderly trial and disposition of the case being heard. This power is fully recognized in our own case of *State v. Galloway*, 5 Cold. (45 Tenn.), 326, 98 Am. Dec., 404. There is no dissension whatever in the authorities as to this power of the courts.

“The object of preventing and, if necessary, to punish, publications calculated to affect prejudicially the interest of suitors is that there may be a fair trial; that the stream of justice shall be allowed to flow unruffled by extraneous influences.” *Regine v. Wilkinson*, 41 U. C. Q. B., 47.

“The reason why the publication of articles like those with which we have to deal is treated as contempt of court, is because their tendency, and sometimes their object, is to deprive the court of the power of doing that which is the end for which it exists—namely, to

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administer justice fully, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence so far as the effectual elimination of prejudice and prepossession is concerned. It is difficult to conceive an apter description of such conduct than as conveyed by the expression, 'contempt of court.' '' *Rex v. Parke*, 2 K. B., 432. (1903.)

Considering the right of the courts of this country to hold in contempt publishers so interfering with pending cases, in view of the constitutional guaranties prevailing in every State as to the freedom of speech and freedom of press, the supreme court of California has observed:

The "liberty of the press must not be confounded with mere license. Liberty of the press stops where a further exercise would invade the rights of others. This provision of the constitution does not authorize the usurpation of the functions of the courts. Under the plea of the liberty of the press, a newspaper has no right to assail litigants during the progress of a trial, intimidate witnesses, dictate verdicts or judgments, or spread before juries its opinion on the merits of cases which are on trial. As stated before, what may be spoken may be written; and the converse of the proposition is true that what may not be spoken under such circumstances may not be written." *In re Shortridge*, 99 Cal., 526, 34 Pac., 227, 21 L. R. A., 755, 37 Am. St. Rep., 78.

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The supreme court of the United States has fully sustained the power of the courts so to deal with publishers of objectionable articles pending the trial of a cause, and has said:

“A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, . . . of private talk or public print.” *Patterson v. Colorado ex rel. Attorney General*, 205 U. S., 454, 27 Sup. Ct., 556, 51 L. Ed., 879, 10 Ann. Cas., 689.

The general result of all the cases is thus summarized in the *Cyclopedia of Law*:

“Publications concerning a pending case, trial, or judicial investigation calculated to prejudice or prevent fair and impartial action, which seek to influence judicial action by threats or other form of intimidation, which reflect upon the court, counsel, parties, or witnesses respecting the case, or which tend to corrupt or embarrass the due administration of justice, constitute contempt. The criminal intent of such publications is immaterial.” 9 Cyc., 20, and cases cited.

For further authorities see cases collected in a note under *Globe Newspaper Co. v. Commonwealth*, 188 Mass., 449, as reported in 3 Ann. Cas., 761.

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The liberty of the press is not a more sacred right than the right, to a fair and impartial trial, which the constitution guarantees to all litigants. If the newspapers are permitted at will to comment on pending cases and to bring to the attention of the jurors sensational rumors and matters which cannot properly be considered in the determination of the issues before them, there can be no such trial. That such publications can be made with impunity is not asserted in any jurisdiction, so far as we know. The courts must be empowered to keep jurors from improper influence pending their deliberations.

It has been asserted in two of our cases that the power to punish for contempt in Tennessee is purely statutory. *State v. Galloway*, 5 Cold. (45 Tenn.), 326, 98 Am. Dec., 404; *Scott v. State*, 109 Tenn., 390, 71 S. W., 824. Our statutes do declare that contempts shall not be punished except as therein provided. Shannon's Code, section 5918 *et seq.*, but see *Graham v. Williamson*, 128 Tenn., 721, 723, 164 S. W., 781.

Whether this attempted limitation of the courts' power to punish contempts is valid legislation we need not here determine. It has been held in several cases that the right of the courts to punish for contempt was—"founded upon the principle, which is coeval with the existence of the courts, and as necessary as the right of self-protection, that it is a necessary incident to the execution of the powers conferred upon the court, and necessary to maintain its dignity, if not its very existence. It exists independently of statute.

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The legislative department may regulate the procedure and enlarge the power, but it cannot, without trenching upon the constitutional powers of the court destroy the autonomy of that system of checks and balances which is one of the chief features of our triple . . . form of government, fetter the power itself.” *In re Shortridge*, 99 Cal., 526, 34 Pac., 227, 21 L. R. A., 755, 37 Am. St. Rep., 78.

See, also, *State v. Morrill*, 16 Ark., 384; *Cartwright's Case*, 114 Mass., 230; *Tinsley v. Anderson*, 171 U. S., 101, 18 Sup. Ct., 805, 43 L. Ed., 91.

The statute abundantly justified the action of the circuit court, however, herein, and it was not necessary to resort to any inherent power.

Section 5918 of Shannon's Code is as follows:

“The power of the several courts of this State to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases.

“(1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.

“(2) The willful misbehavior of any of the officers of said courts, in their official transactions.

“(3) The willful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.

“(4) Abuse of, or unlawful interference with the process or proceedings of the court.

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“(5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them.

“(6) Any other act or omission declared a contempt by law.”

The publication made by the News-Scimitar in this case was properly dealt with by the court under the statute, and the power of the court so to act may be referred to several of the subsections of 5918 of Shannon's Code. The publication in question, under the circumstances of this case, was certainly an unlawful interference with the proceedings of the court. Subsection 4.

It is hard to conceive of any publication more likely to improperly affect a jury than the one for which the editor of the News-Scimitar has been called on to answer herein.

In the first place, the article printed seems to have been displayed and rendered much more conspicuous than its value as a news item would have justified. The first headline extended entirely across the front page of the paper, and the subheading was in extra large type, and the article itself was printed in type about twice as large as was used in the body of the paper elsewhere. It was utterly impossible for this story to have escaped the notice of some of the jurors. The case on trial was a civil case, the jury was not under restraint, and most of them, no doubt, read the newspapers.

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The publication indicated that some mysterious matters connected with the case were contained in the affidavits, and that these matters had been suppressed by the trial judge. It further showed that there was much gossip on the streets as to the contents of the affidavits, and tended to excite the curiosity of the jurors to that point where it was humanly impossible for them to have refrained from an endeavor to get outside information as to what these documents contained.

The article showed that J. H. Lenow, a subscribing witness to the will, upon whose testimony the case of the proponents of the will largely depended, had filed an affidavit along with J. H. Malone, one of the attorneys for contestants. It stated that Lenow's affidavit was filed by Malone. It was thus made to appear that one of the proponents' chief witnesses was taking some concerted action with one of the contestants' leading counsel, to the end that further evidence be placed before the jury after the case had been closed.

The character of this publication, the manner in which it appeared in the newspaper, its contents, and its insinuations could scarcely have failed, coming to the attention of the jury, to have prejudiced the proponents' case. The article seemed to show that Lenow, a subscribing witness to the will, had gone over to the enemy's camp, and was calculated to destroy the effect of his previous testimony in favor of the will.

In so far as we have gone, the court of civil appeals reached the same conclusion, but that court thought

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that the story printed in the News-Scimitar did not come within the scope of the prohibition contained in the order served on the newspapers by the court below, and therefore that Raine was not in contempt.

It is not necessary for us to set out this order and discuss its terms. We, however, do not agree with the court of civil appeals. We think the publication made certainly came within the spirit of the prohibition contained in the court's order, if not within its letter.

Violation of this order, however, was not the essence of the offense. The offense consisted in making a publication which tended to obstruct, embarrass, and improperly influence the trial of the pending cause. If the publication was calculated so to interfere with the proper disposition of the cause, its author was guilty of contempt, regardless of any order.

As stated by the supreme court of California in a similar case:

“If the law, under the circumstances, prohibited the publication, the order of the court was superfluous; and the petitioner is censurable, regardless of that order, for the all-sufficient reason that he has violated the law. If, on the other hand, the law did not prohibit the publication, the petitioner had the right, under the law, to make it, and that right could not be abridged or taken away by an order.” *In re Shortridge*, supra.

When a person violates the law he becomes amenable to punishment, and his *status* is not generally af-

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fectured by any previous warning he may have received as to his proper course of conduct.

In the matter of newspaper publications, regarding cases of interest pending in the courts, much latitude is allowed to the press. A substantially correct report of such proceedings and reasonable comment thereupon is not ordinarily objectionable, and should not be interfered with. *Ex parte Foster*, 44 Tex. Cr. R., 423, 71 S. W., 593, 60 L. R. A., 631, 100 Am. St. Rep., 866; *In re Shortridge*, 99 Cal., 526, 34 Pac., 227, 21 L. R. A., 755, 37 Am. St. Rep., 78. There is, however, a violation of law whenever anything is printed during the trial of a case which is likely to improperly influence the result, and the fact that he may have acted innocently does not relieve the publisher of responsibility.

Our courts are uniformly cautious in declaring persons to be in contempt. If the contempt be merely technical, and inadvertent, no court would be disposed to deal harshly with the offender. There is no danger that any judge will persecute the newspapers or unnecessarily embroil himself with them. The press is too powerful.

The publication in this case was made after Raine had consulted counsel. It was made deliberately, in as conspicuous, not to say as offensive, a manner as possible, and it was a flagrant contempt and a violation of the law regardless of any notice he may have received in reference thereto.

The responsibility of a publisher for such contempts cannot be made to depend upon any warning the court

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may have seen proper to give him, or the terms in which such a warning may have been given. While it is doubtless a good practice on the part of trial courts to notify the press as to matters which should not be printed during the trial of a case, such practice is not necessary. If after such a warning a publisher persists in making offensive publications of this nature, his action becomes mere journalistic bravado, and must be dealt with severely.

So the punishment of the respondent in this case cannot be obviated by any refinements upon the scope and effect of the language used in the order served upon him by the court. The making of the publication after the order aggravated the offense, but the offense did not consist of a mere violation of the order.

It has been said by the supreme court of the United States that:

“When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the courts of justice by premature statement, argument, or intimidation hardly can be denied.” *Patterson v. Colorado ex rel.*, 205 U. S., 454, 27 Sup. Ct., 556, 51 L. Ed., 879.

We cheerfully agree to the foregoing expression, and believe that court proceedings and the action of judges may be made the subject of criticism and full discussion after a case is concluded. Pending the hearing of a case, however, the courts must assert their power to prevent publications that may improperly influence results.

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From the views we have expressed it follows that the judgment of the court of civil appeals was erroneous, and must be reversed. The result reached in the circuit court was right. The case will be remanded to the circuit court of Shelby county for the execution of the orders heretofore made by that court in the case entitled here "Gilbert D. Raine v. State of Tennessee," which was a contempt proceeding instituted against Raine in *Rich v. Murrell*. The judgment below should be corrected to show that respondent is punished for making a contemptuous publication rather than for a violation of the order served on him.

In the case of *T. G. Tate, Sheriff, v. State of Tennessee ex rel.*, which was a *habeas corpus* proceeding instituted in another division of the circuit court, the judgment of the circuit court will be reversed, and the *habeas corpus* proceedings dismissed.

Tax respondent Gilbert D. Raine with all the costs of both cases.

Smith v. Bank.

SMITH *et al.* v. MERCANTILE BANK *et al.**

(Jackson. April Term, 1915.)

BANKS AND BANKING. Representation of bank by president. Individual fraud of officer. Notice to bank.

Where the president of a bank used his mother-in-law's notes, deposited with him for collection, as security for a loan, which he, as president and acting for the bank, made to himself on his own note, he alone acting in the transaction, notice of the character of the notes as a trust deposit was imputed to the bank, since, although where an agent acts in fraud of his principal such agent's notice of the character of the transaction will not be imputed to the principal, nevertheless where such agent, as in the instant case, is the sole representative of the principal in the transaction, the principal is chargeable with notice; there being no room under the facts for the presumption that the agent dealing with his principal on his own account will not communicate his knowledge when it is to his interest to conceal it.

Cases cited and approved: Wood v. Green, 131 Tenn., 583; Provident, etc., Assn. Society v. Edmonds, 95 Tenn., 53; Brookhouse v. Union Pub. Co., 2 L. R. A. (N. S.), 993; Le Duc v. Moore, 111 N. C., 516; Lilly v. Hamilton Bank, 29 L. R. A. (N. S.), 558; First Nat. Bank v. Blake (C. C.), 60 Fed., 78.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
FRANCIS FENTRESS, Chancellor.

*For cases passing upon imputation of knowledge of bank officers to bank, where officers are personally interested, see notes in 2 L. R. A. (N. S.), 993; 29 L. R. A. (N. S.), 558 and 49 L. R. A. (N. S.), 764.

Smith v. Bank.

R. P. CARY, for petitioners.

CARUTHERS EWING, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

In this case Jo. L. Hutton, receiver, is winding up the affairs of the Mercantile Bank, an insolvent corporation. Mrs. Belle K. Allison filed an intervening petition to recover from his possession certain notes which came into his hands as receiver of the said bank. There was a decree in her favor by the chancellor which was affirmed by the court of civil appeals, and the case is before us on petition for *certiorari*.

Petitioner is the mother-in-law of C. H. Raine, formerly the president of the Mercantile Bank. She turned over to her son-in-law a hundred notes for \$100 each, known in the record as the College of Physicians and Surgeons' notes. These notes were turned over to Mr. Raine by Mrs. Allison to be collected by the bank and placed to her credit there as they matured. Mr. Raine put them in his box in the bank vault. Some of them were collected and passed to the credit of Mrs. Allison's account.

Later, the remaining notes were appropriated by Mr. Raine and placed as collateral security to a note of \$21,510.50, which he individually had negotiated with the bank.

The receiver contends that the bank became an innocent holder of the said notes, and that he is entitled to hold them notwithstanding Mr. Raine's fraud.

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The receiver also insists that this case is an exception to the rule that knowledge or notice on the part of the agent is to be treated as notice to his principal, for the reason that in this transaction Mr. Raine's interest was adverse to the bank and he represented himself, and not the bank, in putting up Mrs. Allison's notes as collateral security for his note.

The principal is not ordinarily charged with the knowledge of the agent in a matter where the agent's interests are adverse to those of the principal. The rule that the principal is charged with the agent's knowledge is founded on the agent's duty to communicate all material information to his principal, and the presumption that he has done so. Such a presumption, however, cannot be indulged where the agent is acting in his own behalf, when his interest is antagonistic to that of the principal, "and any conclusion drawn from a presumption that he has done so is contrary to all experience of human nature." 3 R. C. L., 479. See, also, *Wood v. Green*, 131 Tenn., 583, 175 S. W., 1139; *Provident, etc., Assur. Society v. Edmonds*, 95 Tenn., 53, 31 S. W., 168; 2 C. J., 868.

If Mr. Raine had negotiated these notes of Mrs. Allison with any other officer or agent of the Mercantile Bank, the case would fall, no doubt, within the exception to the general rule that a principal is affected with the knowledge of his agent, and inasmuch as Mr. Raine was acting in his own behalf and interest, antagonistic to the bank, the bank would not have been charged with

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his knowledge of the fact that he was fraudulently misappropriating his mother-in-law's securities.

In this case, however, it does not appear that any agent of the bank figured in this transaction except Mr. Raine alone. He appears to have made this loan to himself, and he, acting for the bank, appears to have accepted his own note and the collateral he offered with the note. This is plainly inferable from the record. The answer of the receiver discloses a memorandum made by Mr. Raine himself in which he ordered Mrs. Allison's notes to be collected and credited on his own note. He appears to have acted both for himself and the bank in the transaction.

Under these circumstances, the weight of authority is said to be—

“in favor of a qualification of the foregoing exception so as to exclude therefrom, and therefore to bring within the general rule which charges the principal with the knowledge possessed by the agent, cases where the officer, though he acts for himself or for a third person, is the sole representative of the corporation in the transaction in question.”

See note to *Brookhouse v. Union Pub. Co.*, as reported in 2 L. R. A. (N. S.), 993, 994.

There is said to be no room in such a case for the presumption that an agent, dealing with his principal on his own account, will not communicate his knowledge when it will be to the agent's interest to conceal that knowledge. If the agent is the sole representative of the principal in the transaction with himself,

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there is no one to whom he can communicate his knowledge, nor any one from whom he might conceal it.

“If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interest, however much his conduct may have been. He necessarily knew as much in one capacity as he did in the other.” *First Nat. Bank v. Blake* (C. C.), 60 Fed., 78.

See *Le Duc v. Moore*, 111 N. C., 516, 15 S. E., 888, and numerous cases collected in a note under *Lilly v. Hamilton Bank*, as reported in 29 L. R. A. (N. S.), 558, 562.

So in this case, applying the authorities to the facts stated, we think the bank was charged with knowledge of Raine's lack of title to the notes of Mrs. Allison, and the bank was not an innocent holder of the said notes.

Petition for *certiorari* denied.

Bank v. Bank.

PEMISCOT COUNTY BANK *et al.* v. CENTRAL-STATE NAT. BANK *et al.**

(*Jackson*. April Term, 1915.)

1. BANKS AND BANKING. "Cashier." Authority.

A "cashier" of a bank is its chief executive officer, and as such is held out by the institution as having authority to act in accordance with the usage and practice obtaining in the conduct of the business by banking institutions, and, so acting, he will bind the bank in favor of third persons who possess no knowledge to the contrary, or as to limitations on his power. (*Post*, p. 156.)

Cases cited and approved: *Northern Bank v. Johnson*, 45 Tenn., 88; *Water Co. v. Bank*, 123 Tenn., 364.

2. BANKS AND BANKING. Cashier. Authority to issue drafts.

Though a bank cashier has power to issue and sign drafts drawn on funds of his bank on deposit with a correspondent bank, he has no implied power to draw such drafts in his own favor, or in favor of a creditor in payment of his own debt, and the acceptor in such case is charged with notice. (*Post*, p. 156.)

Cases cited and approved: *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law, 308; *Rochester, etc., Turnpike Co. v. Pavious*, 164 N. Y., 281; *Anderson v. Kissam*, 35 Fed., 699; *Gale v. Chase Nat. Bank*, 104 Fed, 214; *St. Charles, etc., Bank v. Edwards*, 243 Mo., 553; *Home Sav. Bank v. Otterbach*, 135 Iowa, 157; *Debaca v. Higgins*, 143 Pac., 832.

Cases cited and distinguished: *Tisdale v. Tisdale*, 34 Tenn., 596; *Goshen Nat. Bank v. State*, 141 N. Y., 379; *Bank of New York v. American, etc., Co.*, 143 N. Y., 559; *Hanover Nat. Bank v. American Bank, etc., Co.*, 148 N. Y., 612; *Hathaway v. Delaware Co.*, 185 N. Y., 368; *Lanson v. Beard*, 94 Fed., 30.

*For cases passing upon right of one who takes commercial paper of corporation in payment of, or security for, an individual debt of an officer, see note in 31 L. R. A. (N. S.), 169.

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3. BANKS AND BANKING. Cashier. Issuance of draft. Dual relation.

Where a bank cashier, who was also president of a store company, drew a draft on his bank, signed by himself as president of the company, in payment of a debt due from the company, and then drew a draft to order of the bank holding the store draft for collection, with notice of the dual relation, on the correspondent bank of the cashier's bank, and the draft was paid, the payees of the two drafts were not put on notice which would render them liable to refund the money to the cashier's bank on insolvency; the cashier embezzling the money and issuing the drafts without funds. (*Post*, p. 163.)

4. BANKS AND BANKING. Cashier. Issuance of drafts. Dual relation.

A bank cashier is not forbidden by banking custom from drawing a draft in favor of a corporation of which he is president. (*Post*, p. 164.)

Cases cited and approved: *Thompson v. Clydesdale Bank*, 3 A. C., 282; *Ball v. Shepard*, 202 N. Y., 247.

Cases cited and distinguished: *Mining Co. v. Bank*, 10 Colo. App., 339; *Cheever v. Pittsburg, etc., R. Co.*, 150 N. Y., 59; *Bank v. Butler*, 113 Tenn., 574; *Orr v. South Amboy, etc., Co.*, 113 App. Div., 103.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

JOHN JOHNTSON and T. K. RIDDICK, for appellants.
R. P. CARY, G. J. McSPADDEN and SIVLEY & EVANS,
for appellee.

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MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This case stands upon bill of complaint and demurrer.

The bill was filed by the insolvent Pemiscot County Bank, of Caruthersville, Missouri, and its receiver, against defendant bank, hereinafter called the Memphis Bank, and Abston, Wynne & Co., a mercantile firm of Memphis, for the purpose of recovering the amount of a draft drawn by one A. C. Tindle, cashier of the complainant bank, upon that bank's correspondent, the National Bank of Commerce, of St. Louis, Mo., as follows:

“Pemiscot County Bank.

“No. 65805. Caruthersville, Missouri,

“Jan'y 15, 1913.

“Pay to the order of Central State Bank & Trust Co. ten hundred twenty-three and 47/100 dollars (\$1,023.47).

“A. C. TINDLE, Cashier.

“To National Bank of Commerce,

“St. Louis, Mo.”

Stamped on the face:

“Paid Jan'y 18, 1913. The National Bank of Commerce, in St. Louis.”

Indorsed on the back by the payee bank.

The Famous Store Company, of Caruthersville, Missouri, purchased merchandise of Abston, Wynne & Co., and executed to that Memphis firm its draft, payable

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at the Pemiscot County Bank, the depository bank of the Famous Store Company, which draft was deposited for collection in the Central-State Bank & Trust Company (now Central-State National Bank). The Memphis Bank forwarded the draft to the Pemiscot County Bank for realization, and the above St. Louis exchange was forwarded in settlement to the Memphis Bank.

A. C. Tindle was the president and dominating and controlling officer of the Famous Store Company, a body corporate, and the draft of that company, sent Abston, Wynne & Co., was signed in the name of the Store Company, by A. C. Tindle, President. The Memphis firm knew, or is chargeable with knowledge, of the relationship sustained by Tindle to the Store Company. It is alleged that no consideration was paid or passed to the Pemiscot County Bank for the draft.

The bill alleges that Tindle wrongfully, fraudulently, and without authority of the Pemiscot County Bank, of which he was cashier, drew the St. Louis exchange above set forth, along with various other like instruments; that this, with the other amounts embezzled and stolen by Tindle, totaled \$300,000; and that the above draft was paid in the above mode to defendants, who are sought to be held to a repayment of the amount of the same.

The affairs of the Pemiscot County Bank were placed in the hands of a receiver in July, 1914, and the bill of complaint was filed in August thereafter—about seventeen months after the date of the above transaction.

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The theory and allegation of complainants is that Abston, Wynne & Co. knew, or were charged with knowledge, that this draft was being used in the payment of an indebtedness in which Tindle was interested, and are as much liable to respond as if Tindle had drawn the draft in his own favor, or in favor of his individual creditor, in payment of his personal indebtedness.

The above is a summary of the bill of complaint as same was construed and argued at the bar of this court by complainants' counsel and the counsel of defendants.

The demurrer goes upon the theory that the draft was drawn, transmitted, and accepted in due course of business, and that its execution was within the implied power of Tindle as cashier, and therefore that it should be treated as imparting no notice to its takers of anything affecting its validity.

The cashier of a bank is its chief executive officer, and as such is held out by the institution as having authority to act in accordance with the usage and practice obtaining in the conduct of business by banking institutions; and, so acting, he will bind the bank in favor of third persons who possess no knowledge to the contrary, or as to limitations on his powers. *Northern Bank v. Johnson*, 45 Tenn. (5 Cold.), 88; *Water Co. v. Bank*, 123 Tenn., 364, 369, 131 S. W., 447; 1 Michie, Banks and Banking, section 102, p. 713.

Among the powers ordinarily inhering in the office or position of cashier is that of issuing and signing

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drafts drawn on funds of his bank on deposit with a correspondent bank. 1 Morse, Banks and Banking, section 154; 1 Michie, Banks and Banking, section 102, p. 710.

By way of exception to this rule of law, a cashier, as such, has no implied power to draw such drafts in his own favor, or in favor of a creditor in payment of his own debts; and a person who accepts a draft, drawn by a cashier, payable to himself, or used in payment of the individual indebtedness of himself, is put on notice that the fiduciary is discharging his own obligation with the funds of his principal, the bank, and the recipient is not to be treated as an innocent holder of the draft or its money product, and may be called to account for the proceeds by the bank. As Lord Denman observed of commercial paper so drawn: "It bears its death wound on its face." The duty of the recipient is to make inquiry to ascertain whether, there being a lack of inherent power, there existed authority on the part of the cashier from his corporate principal, by way of special or express grant, or by way of implication from a course of like conduct for a long time, acquiesced in by the bank. *Campbell v. Manufacturers' Nat. Bank*, 67 N. J. Law, 308, 51 Atl., 498, 91 Am. St. Rep., 438; *Rochester, etc., Turnpike Co. v. Paviour*, 164 N. Y., 281, 58 N. E., 114, 52 L. R. A., 790; *Anderson v. Kissam* (C. C.), 35 Fed., 699; *Gale v. Chase Nat. Bank*, 104 Fed., 214, 43 C. C. A., 496; *St. Charles, etc., Bank v. Edwards*, 243 Mo., 553, 147 S. W., 978; *Home Sav. Bank v. Otterbach*, 135 Iowa, 157, 112 N. W., 769, 124

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Am. St. Rep., 267; *Debaca v. Higgins* (Colo.), 143 Pac., 832, L. R. A., 1915B, 1091; Michie, Banks and Banking, section 117; Zane, Banks and Banking, 120.

This doctrine has its foundation, to use the language of Judge Caruthers in *Tisdale v. Tisdale*, 34 Tenn. (2 Sneed), 596, 64 Am. Dec., 775, "in that profound knowledge of the human heart, which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth that 'a man cannot serve two masters.' "

While the above doctrine may now be considered to be widely received and fairly firmly fixed, its establishment has not been without hesitation on the part of some of the greatest judicial tribunals. For a time, if, indeed, not until the present, it seems that the court of appeals of New York was hesitant to accept it as altogether sound. In *Goshen Nat. Bank v. State*, 141 N. Y., 379, 36 N. E., 316, it appeared that a county treasurer was also the cashier of the Goshen National Bank. He signed as cashier and forwarded a draft on that bank's New York City correspondent for the amount of the taxes due from him as treasurer of the county to the comptroller of the State of New York, thus embezzling the funds of his bank. That eminent jurist, Rufus W. Peckham, speaking for the court, said:

"Upon the question whether the form of the draft constituted notice to the State or its officer that the funds of the claimant were being used by the cashier to pay his private debt, we think that no notice of such

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fact was conveyed to the comptroller by this form of draft.

“It is the right and duty of the cashier of a bank to sign the drafts drawn in its behalf upon its corresponding bank. This is part of the ordinary duties of such an officer, and affirmative evidence of his power to sign drafts appears in this record, and it also appears that he had the right to draw such draft for himself upon the same terms that he would have had in case of a third party, which means, I assume, upon payment to the bank of the amount of the draft.

“There was an apparent authority to draw the draft. It appeared to have been drawn in the course of the employment of the cashier, and it was an act which was within the scope of his general powers.

“We do not think that, in the case of a bank draft so drawn, the party receiving it would be charged with the duty of inquiry, or with notice of the fact that the cashier had not paid for the draft, and that he was, therefore, using the funds of the bank to pay his private debt. He would only be so using them in case he did not pay for the draft, and its form might be the same, even if he had paid for it in full. We think there is nothing unusual or suspicious in this form of making the draft payable direct to the creditor of the cashier, nor any notice that in so doing the bank's funds have been improperly used. Bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts and in other commercial transactions that they have almost acquired the character-

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Am. St. Rep., 267; *Debaca v. Higgins* (Colo.), 143 Pac., 832, L. R. A., 1915B, 1091; Michie, Banks and Banking, section 117; Zane, Banks and Banking, 120.

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istics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee, and signed by one of the officers usually signing such instruments, they are regarded by the commercial community very much the same as so much cash, and the fact that the draft was drawn by a cashier directly in favor of his own creditor, and sent to that creditor by him, would not naturally give rise even to the suspicion that there was anything irregular, fraudulent, or wrong in the conduct of the cashier. The presumption would be that he had performed his duty and paid for the draft, and that it therefore was his property.”

We are in doubt as to whether that case is still, without limitations, the law in New York on the point here in contest; this, in view of the comments of Judge Peckham himself on the case in the later case of *Bank of New York v. American, etc., Co.*, 143 N. Y., 559, 565, 38 N. E., 713, and of the ruling in *Hanover Nat. Bank v. American Bank, etc., Co.*, 148 N. Y., 612, 42 N. E., 72, 51 Am. St. Rep., 721, on the one hand, and the citation and quotation, with seeming approval, of the case by the same court in its unanimous opinion in *Hathaway v. Delaware County*, 185 N. Y., 368, 78 N. E., 153, 13 L. R. A. (N. S.), 273, 113 Am. St. Rep., 909, on the other hand. However that may be, it is certain that the court in the Goshen National Bank Case took the position it did because it recognized the fact that bank drafts as a medium of exchange are by the commercial world treated as closely approximating currency, and appreciated that as little clouding as possible, by re-

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strictive rules of law, of such use of bank drafts, is in the interest of the commerce of the country.

In the case of *Lamson v. Beard*, 94 Fed., 30, 36 C. C. A., 56, 45 L. R. A., 822, it appeared that the president of a bank, Cassatt, instead of the cashier, was its principal executive officer; that he had entire control of its affairs, and drew drafts on the bank's funds in the hands of its correspondent bank in Chicago, payable to a commission firm in Chicago, on account of margins on speculative investments made through the firm by the president. The drafts were signed in the name of the drawer bank by the president, as such, payable to the firm, and were on receipt credited to the president's personal account in the firm's bank of deposit, which last-named bank presented them for payment at the correspondent bank. The firm knew of the president's official connection with his bank, and that he was losing money in the series of speculations carried on through them; but the firm made no inquiry of the other officers or directors of that bank to learn whether the president was furnishing his own funds in the payment for the drafts, or whether his so issuing the drafts was authorized by the bank. It was held that the commission firm, in receiving the drafts and their avails, was chargeable with notice of misappropriation by Cassatt to support such margins, and judgment was awarded the receiver of the bank for the amount of the drafts, with interest. After stating that a general authority given to an agent to do an act in behalf of the principal does not extend to a case where it appears

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that the agent himself is the person interested on the other side, and that, if such power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it, it being against the law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time, the court further said:

“If, for instance, Cassatt had sent to the plaintiffs in error money of the bank, instead of drafts, advising them that it belonged to the bank, there could be no question of their liability to make restitution; and in what respect is their position better . . . than it would be on the facts supposed, even conceding that the drafts sent them were the same, or ‘almost the same,’ as money? The drafts bore proof on their face . . . that they were not drawn in the course of the bank’s business, but in discharge of individual liabilities of the president of the bank to themselves, they, of course, understood. They therefore knew that, unless there had been conferred upon Cassatt an unusual and special authority, like that given the cashier in *Goshen Nat. Bank v. State*, supra, to sign and issue drafts of the bank in his private transactions, the paper sent them was unauthorized, and that for the proceeds thereof they would be liable to the bank or its representatives.”

This case of *Lamson v. Beard* was carried to the supreme court of the United States, where it was argued before a full bench of that court in November, 1900, and evidently because of its difficulty in the view

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of that court it was in the May following ordered to be reargued, but before the date for reargument was reached the cause was dismissed (February, 1902) on stipulation of counsel, so that it did not come to decision in that court. 186 U. S. (mem.), 22 Sup. Ct., 939, 46 L. Ed., 1265.

In this state of the law, and in this attitude of the court in respect to the doctrine above stated, we are asked to take a step further in advance, and to hold that where the cashier of a bank issues a draft of his bank on its correspondent, over his signature as cashier, to the collecting bank or agency of a creditor of a mercantile corporation in honoring that corporation's draft or check on the bank, or for a note payable there, the same rule as to imputed notice of embezzlement shall apply.

The matter may be presented in sharper outline if, purely for the purpose of test, the case be conceded to be that the draft was drawn directly in favor of Abston, Wynne & Co., as payees, as a way of the Pemiscot County Bank's paying the draft on it issued to the Memphis firm by the Famous Store Company. May the doctrine be fairly or justly extended, so as to hold the Memphis firm to have been put on inquiry as to the cashier's authority by what would thus appear on the face of the bank's draft?

In our opinion it cannot, and we are entirely satisfied in declining to so hold.

The Famous Store Company was an entity distinct from Tindle; it was accepted and dealt with as a cus-

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tomers by the bank as such entity. To the extent that Tindle, as president of the Store Company, controlled its affairs, it would have cast at least a shade of suspicion on the bank in the community, had that company failed or refused to do business with the bank of which Tindle was cashier. It would be an undue stretch to hold that the drawing of a draft on a correspondent city bank by Tindle as cashier in favor of the Store Company or its creditor imparted notice to the creditor on reception that Tindle was unfaithful in his trust as cashier. Abston, Wynne & Co. were not his individual creditors. We must assume, even if Tindle dominated the Store Company, that there were directors and agencies in that company who were true to their trusts, and would refuse to join Tindle in looting the bank in its behalf, and who would, at least in the view of the trading public, operate to deter Tindle from such speculation for that company's benefit.

The counsel of the appellee cite no authority which supports such an advanced position; they concede that after diligent search they have been unable to find any.

It is apparent that appellees must maintain the position that Tindle, as cashier, and therefore as chief executive officer, of the bank, was without power or authority to act in accordance with the usage, practice, and course of business of banking institutions in drawing drafts in favor of corporations in which he was also an officer. Touching the principle bearing upon that point, it was said in *Mining Co. v. Bank*, 10 Colo. App., 339, 347, 50 Pac., 1055, 1058, as follows:

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“It is contended that the note appeared upon its face to be executed by a corporation, and to a corporation of both of which the same person was president, and that this was sufficient notice to put J. B. Wheeler & Co. and each subsequent transferee upon inquiry as to all matters affecting its validity. . . . In any event, the argument depends for its force upon the theory that where a note is executed by one corporation to another, and the same person is president of both, it is *prima facie* void. These premises are not correct, and the argument therefore falls to the ground. However much such a circumstance may render it obligatory upon a court to scrutinize closely the *bona fides* of a transaction in certain cases, it by no means follows that it creates a presumption as to the invalidity of the paper, either as to want of authority to execute it, or of consideration. . . . The note did not disclose any suggestion that the maker was without authority to make it, or that it was for the benefit of any one of the officers making it.”

See, also, *Cheever v. Pittsburg, etc., R. Co.*, 150 N. Y., 59, 44 N. E., 701, 34 L. R. A., 69, 55 Am. St. Rep., 646 (cited and quoted with approval in *Bank v. Butler*, 113 Tenn., 574, 83 S. W., 655), and *Orr v. South Amboy, etc., Co.*, 113 App. Div., 103, 98 N. Y. Supp., 1026.

To enlarge the above exception to the general rule as to the power of a cashier to issue bank drafts, so as to include in that exception drafts or cashier's checks drawn in favor of such corporations or its creditors, would be to seriously hamper commercial transactions.

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The settlements made with such paper as exchange vastly exceed in number and amount those made with currency. Sound policy dictates that no further burden be placed by the courts on such paper to the embarrassment of commerce. The free flow and the amplest acceptance by the trading public of such paper should be facilitated by the law, not further embarrassed or hindered. Judge Peckham well said that bank or cashier's drafts are used so enormously at the present time in payment of debts and in settlements that they have almost acquired the characteristics of money, and are regarded by the commercial community as so much cash. True, money bears no "earmarks" that may give rise to suspicions on the part of the recipient as to the manner in which it was obtained by one who pays it (*Thompson v. Clydesdale Bank* [1893], 3 A. C., 282, 69 L. T. N. S., 156; *Ball v. Shepard*, 202 N. Y., 247, 95 N. E., 719; *Goshen Nat. Bank v. State*, supra), while bank drafts may, as we have observed, still the better policy does not look towards the courts adding to such drafts other marks of dissimilarity to currency.

It is more reasonable and just to place upon the directors of a bank the hazard of guarding their institutions from embezzlement by the cashier, who is chosen, and may be caused to be adequately bonded, by them, than to shift the perils incident to his wrongdoing against the institution to the public which is without voice in that regard. Such dishonesty is, fortunately, a thing sporadic, and its results, practically speaking, are confined to a limited territory and to com-

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paratively few persons; whereas, further restrictive rules would affect the currency of such commercial paper, measureless in volume, every business day of the year.

As was said in *Cheever v. Pittsburg, etc., R. Co.*, supra, in reply to a suggestion that a similar ruling would open an easy way for the perpetration of frauds:

“It is more reasonable and just to assume that corporations will be able to protect themselves by proper vigilance from the dishonesty of their own officers than to impute to parties who have taken the paper for value, ignorant of its origin, constructive knowledge of the facts upon such circumstances as exist in this case.”

If the results of delinquency or lack of diligence on the part of the management or supervising agencies of a bank are to be shifted to and borne by the public, then from the standpoint of economics this should be done by way of an undisguised tax levied on the holdings of the public, rather than by way of further depreciating and clouding a medium of exchange so widely in use.

We do not find it necessary to discuss that phase of the case presented by the fact that Abston, Wynne & Co. surrendered to the Pemiscot County Bank the check of the Store Company when the draft on the St. Louis correspondent was transmitted, and as to how far value was given thereby; nor need we comment on how far unfairness might be involved in holding the Memphis firm to constructive notice and to account, since in usual course of business that firm in all likelihood

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would never see the St. Louis exchange transmitted to the Memphis Bank in payment of the Store Company's check. That draft would be sent by the Memphis Bank to the St. Louis Bank for realization and there held as a voucher.

We hold that the principle applicable, where a bank cashier executed the bank's obligation to himself as payee and presents it in payment of his own obligation, is not to be extended so as to cover a case such as is presented on this record, under the doctrine of constructive notice of a lack or palpable excess of power on the part of the cashier who drew the draft.

The result is that the decree of the chancellor must be reversed; but in justice to that able official it should be explained again that the bill of complaint, as construed and put by counsel to this court, differed from the bill as drafted and filed, and as it may have been considered by the chancellor, in the court of trial. The course of counsel in thus fairly phasing the case for test on appeal is most commendable.

Reversed.

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TODTENHAUSEN v. KNOX COUNTY *et al.**

(Jackson. April Term, 1915.)**

1. STATUTES. Special legislation. Counties.

Const. art. 11, sec. 8, inhibiting the suspension by the legislature of any general law for the benefit of any particular individual, does not prevent a special act for the benefit of a county, like Priv. Acts 1915, ch. 117, authorizing a county to issue and sell bonds for highways. (*Post*, p. 172.)

Cases cited and approved: Redistricting Cases, 111 Tenn., 287; State v. Wilson, 80 Tenn., 246; Ballentine v. Pulaski, 83 Tenn., 636; Williams v. Nashville, 89 Tenn., 487; Burnett v. Maloney, 97 Tenn., 697; Furnace Co. v. Railroad Co., 113 Tenn., 722; Fisher v. Wilson, Mem., Sept. Term, 1911.

Constitution cited and construed: Art. 11, sec. 8.

2. EVIDENCE. Judicial notice. Legislative journals.

Judicial notice of house and senate journals will be taken, not only before they are printed, but on demurrer to a bill alleging a statute was not passed conformably to the constitution. (*Post*, p. 173.)

Cases cited and approved: Webb v. Carter, 129 Tenn., 196; State v. Swiggart, 118 Tenn., 556; People v. Mahaney, 13 Mich., 492; Turner v. Hocker, 36 Fla., 362.

Code cited and construed: Sec. 5584 (S.).

Constitution cited and construed: Art. 2, sec. 21.

3. STATUTES. Bills and subject. County roads.

Priv. Acts 1915, ch. 117, sec. 23, in part fixing and defining the powers, duties, and responsibilities of the good roads commission, created by the act for Knox county, falls under, and is

*For cases passing upon judicial notice of existence and contents of legislative journals, see note in 40 L. R. A. (N. S.), 38.

**Note: This cause was advanced for hearing in the Supreme Court and was determined at the April term, 1915, at Jackson, Tennessee, on the 3rd day of June, 1915, and the opinion filed with the Clerk of the Supreme Court at Knoxville, Tennessee, on June 5th, 1915.

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expressed by, the part of the title, "To create a good roads commission for said county, and fix and define its powers, duties, and responsibilities," within Const. art. 2, sec. 17, requiring a statute to have only the subject which shall be expressed in the title. (*Post*, p. 175.)

4. STATUTES. Certainty. Road commissioners.

There is no fatal uncertainty in Priv. Acts 1915, ch. 117, sec. 23, when considered with the rest of the act, as to when the good roads commission, created for Knox county, shall take control, and when the regular road commission shall resume control, it being clear the good roads commission is to take control of the roads it may elect to build or repair when the funds have been provided by sale of the bonds, and in its proper discretion the time has arrived for it to assume control, and that when its work is completed the regular road commission shall resume control. (*Post*, p. 175.)

5. STATUTES. Single subject.

Within Const. art. 2, sec. 17, the subject of a statute is single when the statute has but one general object, or purpose, however many be the means provided for effecting it. (*Post*, p. 175.)

Cases cited and approved: Railroad v. Byrne, 119 Tenn., 299; State v. Brown, 103 Tenn., 449; Morrell v. Fickle, 71 Tenn., 79; State v. Hamby, 114 Tenn., 364; Cannon v. Mathes, 55 Tenn., 504; Frazier v. R. R. Co., 88 Tenn., 157; Scott v. Marley, 124 Tenn., 398.

Constitution cited and construed: Art. 2, sec. 17.

6. HIGHWAYS. "County officer." Good roads commissioners.

The members of the good roads commission created and named by Priv. Acts 1915, ch. 117, merely to superintend the expenditure of a bond issue on roads in Knox county, are not "county officers" within Const. art. 11, sec. 17, providing no county office created by the legislature shall be filled except by the people or the county court. (*Post*, p. 177.)

Cases cited and distinguished: State v. Kenyon, 7 O., 562; Sheboygan v. Parker, 3 Wall., 93; Liebman v. San Francisco, 24 Fed.,

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719; Bunn v. People, 45 Ill., 408; State v. Lamantia, 33 La. Ann., 449; Lewis v. Jersey City, 51 N. J. Law, 242; Horton v. Thompson, 71 N. Y., 521; Attorney-General v. McCaughey, 21 R. I., 341.

Constitution cited and construed: Art. 11, sec. 17.

7. HIGHWAYS. Good roads commissioners. Filling vacancies.

The provision of Priv. Acts 1915, ch. 117, that vacancies in the temporary good roads commission thereby created for Knox county shall be filled by the remaining commissioners is authorized by Const. art. 7, sec. 4, providing that the election of all officers, and the filling of vacancies not otherwise directed by the constitution shall be made in such manner as the legislature shall direct. (*Post*, p. 178.)

Case cited and approved: Condon v. Maloney, 108 Tenn., 83.

Constitution cited and construed: Art. 7, sec. 4; Art. 11, sec. 17.

FROM KNOX.

Appeal from the Chancery Court of Knox County.
WILL D. WRIGHT, Chancellor.

NOBLE SMITHSON, for appellant.

SHIELDS & CATES and JAMES G. JOHNSON, for appellees.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This cause, for good and sufficient reasons to the court appearing, has been advanced and heard at our 1915 Jackson term, under the provisions of our statutes.

On May 1, 1915, August Todtenhausen, on behalf of himself and all other taxpayers of Knox county, filed

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his original bill in this cause, seeking to restrain the sale of certain bonds issued by the county of Knox, under the authority of an act of the general assembly approved March 19, 1915, and being chapter 117, Senate Bill 386, Private Acts 59, general assembly of the State of Tennessee.

The above act is entitled:

“An act to authorize Knox county Tennessee, acting through its quarterly court, to issue and sell \$500,000 of its five per cent interest bearing coupon bonds for the purpose of building and repairing pike roads and bridges in said county; to provide for the payment of interest on said bonds, to pay off and retire said bonds at maturity, and to provide a sinking fund for said purpose; to create a good roads commission for said county, and fix and define its powers, duties, and responsibilities; to provide for the safekeeping and disbursement of the proceeds of the sale of said bonds, and to repeal all laws in conflict with this act.”

The defendants demurred to the bill, and the chancellor, on May 10, 1915, sustained the demurrer and dismissed the bill. Todtenhausen appealed to this court, and by his assignment of errors, the following questions are presented:

First. It is said the act violates article 11, section 8, of the constitution of Tennessee, in that the act is a special one for the benefit of Knox county, and that said article of the constitution withholds from the legislature powers to suspend any general law for the

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benefit of any particular individual, etc. There is no merit in this point. It has long been settled in this State that article 11, section 8, does not withhold power from the legislature to pass laws empowering counties and municipalities to make contracts and to impose taxes for internal improvements, etc. *Redistricting Cases*, 111 Tenn., 287, 80 S. W., 750; *State v. Wilson*, 12 Lea, 246; *Ballentine v. Pulaski*, 15 Lea, 636; *Williams v. Nashville*, 89 Tenn., 487, 15 S. W., 364; *Burnett v. Maloney*, 97 Tenn., 697, 37 S. W., 689, 34 L. R. A., 541; *Furnace Co. v. Railroad Co.*, 113 Tenn., 722, 87 S. W., 1016; *Fisher v. Wilson*, Mem., Sept. Term, 1911. In respect of such benefits conferred by special laws on municipal corporations and counties, these governmental agencies are regarded as arms of the State government, and the benefits are considered as conferred on the public rather than on individuals. *State v. Wilson*, supra.

Second. It was averred in the bill of complaint, on information and belief, that the act in question was not passed in the manner required by section 18, article 2, of the constitution, and therefore that the act never became a law. When such a question as this arises, whether upon demurrer or other form of pleading, the judicial knowledge of the court is brought into play, and the journals of the house and of the senate are looked to, and from them the question is determined by the court. Therefore it is a mistake to suppose that the demurrer admitted the truth of the averment of the bill upon this point. "The demurrer does

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not admit any matters of law suggested in the bill, or inferred from the facts stated; nor does it admit the arguments, the deductions, inferences, or conclusions set forth in the bill; nor does a demurrer admit allegations contrary to facts judicially known to the court. Upon the argument of a demurrer the bill alone must be looked to for the facts of the case except such facts as the court may judicially know." See Gibson's Suits in Chancery, section 304. In *Webb v. Carter*, 129 Tenn. (2 Thomp.), 196, 165 S. W., 426, we looked to the journals of the house and of the senate to determine whether a quorum was present, when, as was in that case insisted, an act was passed. See cases there cited, and see, also, article 2, section 21, constitution of Tennessee; section 5584, Shannon's Code; *State v. Swiggart*, 118 Tenn., 556, 102 S. W., 75; *People v. Mahaney*, 13 Mich., 492; *Turner v. Hocker*, 36 Fla., 362, 18 South., 767. There is no merit in the insistence that we may not look to the journals of the two houses, because they have not been published in printed form. If necessary, we might look to the original journals. The journals are required to be kept by article 2, section 21, of the constitution, and under section 5584, Shannon's Code, we may look to copies of the journals officially certified by the officer having custody of the originals, or the copies thereof purporting to have been printed by order of the legislature, or either branch thereof. We have before us copies certified as above, and from their recitals it is clear that the act here in question was passed in the manner required

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by the constitution. It, therefore, results that the second insistence is unsound.

Third. Section 23 of the act in question is as follows:

“Be it further enacted that said good roads commission is hereby given full authority, control and supervision of all such roads as it shall elect to build or repair while said road is being constructed or repaired, after which time the control and supervision of said road shall belong to the regular road commission of Knox county.”

It is insisted that the legislation accomplished by section 23 above set out is not expressed in the title of the act, and violates that part of section 17, article 2, of the constitution which provides that:

“No bill shall become a law which embraces more than one subject, that subject to be expressed in the title.”

One of the purposes of the act expressed in its title is as follows:

“To create a good roads commission for said county, and fix and define its powers, duties and responsibilities.”

See the caption above copied. Manifestly section 23 of the act falls under, and is expressed by, the last above quoted part of the title, and section 23 in part fixes and defines the powers, duties, and responsibilities of the commission, so we think there is no merit in this point. But it is said that section 23 is void for uncertainty, because it fails to fix the time at which

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the good roads commission shall take control and supervision of the several roads which it may elect to build or repair, and fails to fix the time when the regular road commission of Knox county shall resume control and supervision of said roads, and creates doubts and uncertainty as to the rights, duties, jurisdiction, and powers of the regular road commission and of the good roads commission. It is to be remembered that section 23 is not the entire act. There are 24 sections in the act, and, reading the entire act, it is clear that its purpose is that the good roads commission shall take control of the roads which it may elect to build or repair when the funds have been provided by sale of the bonds, and when in the proper discretion of the commission the time has arrived for it to assume control. It would have been unwise for the legislature, by the act, to have fixed a specific date when the good roads commission should take or relinquish control of the roads, because it could not be known to the legislature just when the funds resulting from bond sales would be in hand, nor just how much time would be consumed in the contemplated building and repairing of the roads. There is, in our opinion, no fatal uncertainty in section 23, nor in the entire act. As we see the purpose of the act, it is that the regular road commission of Knox county shall yield control when the good roads commission sees proper to assume control of the roads which the latter commission may elect to build or repair, and when the work of the good roads commission is completed, the regular road com-

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mission of Knox county shall resume control of the roads. We think the purpose of the act in this respect is very clear. "When a statute has but one general object or purpose, the subject is single, however multitudinous may be the means or instrumentalities provided for effecting that purpose." *Railroad v. Byrne*, 119 Tenn., 299, 104 S. W., 460; *State v. Brown*, 103 Tenn., 449, 53 S. W., 727; *Morrell v. Fickle*, 3 Lea, 79; *State v. Hamby*, 114 Tenn., 364, 84 S. W., 622; *Cannon v. Mathes*, 8 Heisk., 504; *Frazier v. R. R. Co.*, 88 Tenn., 157, 12 S. W., 537; *Scott v. Marley*, 124 Tenn. (16 Cates), 398, 137 S. W. 492.

Fourth. It is next said that the act contravenes article 11, section 17, of the constitution which provides:

"No county office created by the legislature shall be filled otherwise than by the people or the county court."

This insistence rests upon the fact that by the tenth section of the act five persons are therein named as commissioners empowered to carry out its provisions, and by the eleventh section of the act it is provided:

"Should any vacancy occur in said commission by death, resignation, or removal, said vacancy shall be filled by the remaining commissioners until the quarterly county court may fill such vacancy," etc.

—and the point is made that the commissioners are county officers within the meaning of the above quoted provision of the constitution. The precise question here presented was ruled upon by us in *R. J. Fisher*

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et al. v. W. P. Wilson et al., from the McMinn Equity Docket, in an opinion filed October 2, 1911, and the court, speaking through Mr. Justice Green, said:

“In reply to this contention we may observe that we do not regard these pike commissioners as county officers in the constitutional sense of the term. The duties of these commissioners are not permanent. The commission was instituted merely to superintend the expenditure of said issue upon certain named roads in McMinn county. These commissioners are not authorized to exercise any political or governmental county functions. Their employment is temporary, and for a single object. Many of the States have constitutional provisions as to the filling of county offices similar to ours, and this question has arisen in many other jurisdictions” (citing 19 Am. & Eng. Encyc. of Law [1 Ed.], pp. 382-390; *State v. Kenyon*, 7 O., 562; *Sheboygan v. Parker*, 3 Wall., 93, 18 L. Ed., 33; *Liebman v. San Francisco* (C. C.), 24 Fed., 719; *Bunn v. People*, 45 Ill., 408; *State v. Lamantia*, 33 La. Ann., 449; *Lewis v. Jersey City*, 51 N. J. Law, 242; 17 Atl., 112; *Horton v. Thompson*, 71 N. Y., 521; *Attorney-General v. McCaughey*, 21 R. I., 341, 43 Atl., 648).

See, note, 63 Am. St. Rep., 187.

So we hold that the commissioners named by the present act are not county officers within the meaning of the seventeenth section of article 11 of the constitution.

Fifth. It is said that the act also violates the last above section of the constitution, in that it

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authorizes the commissioners to fill vacancies as above stated, but from what has been said it is manifest that this insistence cannot be sustained. Granting to the legislature the power to create the board of commissioners, and to name its members, we think its power to authorize that board to fill temporary vacancies in the membership of the board must follow by analogy, for we find that section 4, art. 7, of the constitution provides that the election of all officers, and the filling of all vacancies not otherwise directed or provided by this constitution, shall be made in such manner as the legislature shall direct. *Condon v. Maloney*, 108 Tenn., 83, 65 S. W., 871.

Sixth. It is next said, and finally, that the act violates article 11, section 17, of the constitution, in that the good roads commissioners are, by the act, appointed for life, but we failed to find any such provision in the act. We have already indicated our views of the purpose of the act, as to the term of service of the commissioners. Certainly, as we construe the act, it is not in contravention of article 11, section 17. There is nothing in the act, nor in its purpose, to indicate that the commissioners are appointed for life.

The decree of the chancellor was correct, and it is affirmed at appellant's cost.

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HEISKELL v. KNOX COUNTY *et al.**

(Jackson. April Term, 1915.)

1. EVIDENCE. Judicial notice. Legislative journals.

The court takes judicial notice of the journals of the legislature, showing the steps taken in the enactment of statutes. (*Post*, p. 183.)

Case cited and distinguished: *State v. Swiggart*, 118 Tenn., 556.

Code cited and construed: Sec. 5584 (S.).

Constitution cited and construed: Art. 2, secs. 18, 21.

2. PLEADING. Demurrer. Judicial notice.

Judicial notice of legislative journals, showing the proper enactment of a statute, may be taken on demurrer to a bill, charging that a statute was not regularly enacted; a demurrer not admitting allegations contrary to facts judicially known to the court. (*Post*, p. 185.)

3. EVIDENCE. Judicial notice. Legislative journals.

Judicial notice will be taken of journals of the legislature before they are published. (*Post*, p. 186.)

4. STATUTES. Legislative journals. Conclusiveness.

Journals of the legislature cannot be impeached even for fraud or mistake, but any errors therein can be corrected only by the legislature. (*Post*, p. 186.)

Cases cited and approved: *Cohn v. Kingsley*, 5 Idaho, 416; *White v. Hinton*, 3 Wyo., 753.

5. STATUTES. Enactment. Reading.

Const. art. 2, sec. 18, requiring a bill to be read and passed in each house on three separate days, is satisfied, where it is introduced in duplicate in the two houses, and the Senate bill, after passing its third reading and being enrolled, is on the third reading in the house substituted for the house bill and passed. (*Post*, p. 187.)

*For cases passing upon judicial notice of existence and contents of legislative journals, see note in 40 L. R. A. (N. S.), 38.

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Case cited and approved: *Archibald v. Clark*, 112 Tenn., 532.

Constitution cited and construed: Art. 2, sec. 18.

6. STATES. Credit. State university. County aid.

Priv. Acts 1915, ch. 1, authorizing Knox county to issue bonds and therewith buy lands, title to be conveyed to the State for the use of the State university, for educational, experimental, and agricultural purposes, does not contravene Const. art. 2, sec. 29, prohibiting a county or municipality, unless authorized by its electors, from giving or loaning its credit to or in aid of any person, company, association, or corporation, or from becoming a stockholder with others in any company, association, or corporation; the mischief sought to be prevented being a business partnership between a municipality or county and individuals or private corporations or associations. (*Post*, p. 188.)

Cases cited and distinguished: *Ransom v. Rutherford Co.*, 123 Tenn., 1; *East Tennessee University v. Knoxville*, 65 Tenn., 176.

Constitution cited and construed: Art. 2, sec. 29.

7. COUNTIES. Purchase by county. Injunction. Bill.

The averment of the unverified bill to enjoin a county from buying land that too much is being paid for it, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is worth, this going as a profit to promoters, is insufficient as an attack on the purchase, authorized by the legislature at the price attacked. (*Post*, p. 191.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
R. H. SANSOM, Special Chancellor.

NOBLE SMITHSON, for appellant.

SHIELDS & CATES and JOHNSON & Cox, for appellee
Knox County.

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MAYNARD & LEE and WEBB & BAKER, for appellee University of Tennessee.

MR. JUSTICE FANCHER delivered the opinion of the Court.

It appearing to the court that the public interest requires it, this case was advanced for hearing and was heard at Jackson on May 31, 1915, as provided by law, upon the transcript of the record from Knox county chancery court, the assignments of error by appellant, reply brief thereto, and the oral argument.

It appears that defendants T. A. Wright and others were the owners of a tract of land near Knoxville, known as the Cherokee tract, and the quarterly court of Knox county, on the first Monday in January, 1915, adopted a resolution upon a proposition made to it by the owners to buy said land, and that the title thereto should be conveyed to the State of Tennessee for the use of the University of Tennessee.

It further appears that the legislature of this State passed an act at its recent session, being chapter 1, authorizing Knox county to purchase said property for agricultural, experimental, and educational purposes, to be held by the State for the use of the University of Tennessee at Knoxville, and to authorize the county court of said county to issue and sell coupon bonds in an amount not to exceed \$125,000 to pay for same, and to provide for the redemption of said bonds.

On March 23, 1915, this bill was filed by S. G. Heiskell on behalf of himself and all other taxpayers of

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Knox county, praying an injunction against the sale of said bonds, to which bill Knox county, and R. A. Brown, as county judge thereof, together with the owners of said Cherokee tract of land, were made defendants.

The bill of complainant contains a number of allegations, in which the act of the legislature authorizing the sale of this property is attacked on various grounds, and questions are also made as to the right of the county to purchase property of this nature for the purposes proposed, and also averring that the said land is not worth the price proposed to be paid for it; that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is really worth, this sum being added to the real value of the land as a bonus or profit to some of the promoters. The questions raised as to the act of the legislature authorizing the sale relate to the constitutionality of the act.

Demurrers were interposed to the bill by the defendants. They also answered the bill on March 29, 1915. On April 7, 1915, the chancellor sustained all the demurrers and dismissed the bill, and complainant, Heiskell, appealed in error to this court. Only three of the questions raised in the original bill are now insisted upon in the assignments of error. We will now take up these three propositions.

The first assignment of error is upon the question raised in the bill in section 5 thereof, and is based on article 2, section 18, of the constitution of Tennessee. This section of the bill alleges that the act authorizing

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the purchase of the property and providing for the issuance of bonds for that purpose was not read once on three different days and passed each time in the house, where it originated, before it was transmitted to the other house, and that the bill was never read and passed on three different days in each house of the legislature; that said act did not receive the assent of the majority of all the members to which each house was entitled under the constitution, as required by section 18, article 2.

This part of the bill was demurred to by Knox county, R. A. Brown, county judge, and Jesse L. Henson, county court clerk, specially on the ground that the journals of the senate and house of representatives (of which the court will take judicial notice) show that said act was duly, legally, and constitutionally passed.

Certified copies of the journals of the senate and house of representatives were exhibited with the demurrer on the trial of the cause, and certified copies are filed with this court as a part of the brief.

It is said by complainant that the demurrer admitted the truth of this allegation, and the position is taken that the averments of the bill cannot be put in question upon the demurrer.

Article 2, section 21, of our constitution provides that each house shall keep a journal of its proceedings; the ayes and noes shall be taken in each house upon the final passage of each bill of a general character and bills making appropriations of public moneys.

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It is provided by section 5584, Shannon's Code of Tennessee, that the proceedings of the legislature are proved by the journals.

This court has held in *State v. Swiggart*, 118 Tenn., 556, 102 S. W., 75, that the court will take judicial notice of the journals of the general assembly showing the various steps taken in the enactment of statutes, and that these need not be specially pleaded or proved if a statute is attacked for want of formalities in its enactment required by the constitution. It was held that every reasonable presumption will be made in favor of the regularity and validity of the proceedings of the general assembly as a co-ordinate branch of the government.

It was unnecessary to file copies of these entries from the journals of the house and senate except to call the court's attention thereto. Can the court take notice of these proceedings upon a demurrer, in the face of a direct charge in the bill that such proceedings were not regular as required by the constitution? Or is it required that litigants and the courts must wait until an answer is filed and an issue of fact raised upon the question before the court may judicially note these proceedings? We think not. It seems clear that there is no necessity that pleadings make an issue in order for the court to take notice of these journal entries, but the court will take notice of such proceedings, as it always takes notice of any statute of the general assembly.

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It is true that the demurrer admits the truth of facts charged in the bill. But this confession for the purpose of hearing the demurrer is strictly confined to the facts. The demurrer does not admit matters of law suggested in the bill or inferred from the facts stated, nor does it admit the arguments, deductions, inferences, or conclusions set forth in the bill. It does not admit allegations contrary to the facts judicially known to the court. Gibson's Suits in Chancery (2 Ed.), section 304; 1 Daniel's Chancery Practice, 545, 546. It is said by Mr. Daniel, on page 546 of said volume:

“When facts are averred in the bill which are contrary to any fact of which the court takes judicial notice, the court will not pay any attention to the averment. Thus where in order to prevent a demurrer it was falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent State, Sir Lancelot Shadwell, V. C., upon the argument of a demurrer to the bill, held that the fact averred was one which the court was bound to take notice of as being false, and that he must therefore take it just as if there had been no such averment in the record.”

We hold therefore that the court may take judicial notice of these journal entries for the purpose of determining whether the bill was constitutionally passed.

The journal had not been published when this case was tried before the chancellor, but it had been made out, and it is the journal, and not its publication, of which the court takes notice. If the journal could be

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disputed or contradicted, then an issue might be presented upon this charge in the bill, but it is the consensus of authority that the recitals in the journals of the legislature are conclusive. They are entitled to absolute verity, and cannot be impeached on the ground of mistake or fraud. If there are errors, the house itself is the only tribunal authorized to correct them. 38 Cyc., 958; *Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac., 985, 38 L. R. A., 78; *White v. Hinton*, 3 Wyo., 753, 30 Pac., 953, 17 L. R. A., 66.

The journals of the senate and house show that this bill was constitutionally passed. The bill was introduced concurrently in the house and in the senate. After having been passed by the senate, as required by the constitution, having passed the first and second readings on two separate days, it was passed on its third and final reading on another day by a vote of twenty-six ayes, which was unanimous. It was thereupon enrolled and transmitted to the house. In the meantime the house bill upon the same subject and for the same identical purpose had been likewise passed upon its first and second readings on two separate days, and recommended for passage by the Committee on Agriculture, and on another and later day the senate bill, having been transmitted to the house, was substituted for the house bill, and thereupon passed its third and final reading in the house by a vote of seventy-one ayes, being unanimous. The house bill and senate bill were the same in tenor and substance in their caption and body, and when the senate bill was substituted for

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the house bill and read and finally passed in the house as above indicated, the law was constitutionally enacted, and the constitutional requirements of article 2, section 18, that a bill shall be read and passed in each house on three separate days, complied with. *Archibald v. Clark*, 112 Tenn., 532, 82 S. W., 310.

The second assignment of error is upon the question raised by section 7 of the bill, based on article 2, section 29, of the constitution, to the effect that the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation except upon an election to be first held by the qualified voters of such county, city, or town and the assent of three-fourths of the votes cast in said election; nor shall any county, city, or town become a stockholder with others in any company, association, or corporation except upon a like election and the assent of a like majority.

The bill charged that the effect of the action of the county court and the act of the legislature was to give or loan the credit of Knox county to the University of Tennessee without such an election, and therefore was in violation of the constitution.

The defendants demurred to this portion of the bill because the State of Tennessee is not a person, company, association, or corporation within the meaning of said constitutional provision, and that the county was not required, under the constitution, to submit the issuance of said bonds to an election of the qualified voters of the county, and that their issuance by the

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county court under the provisions of the act in question was not unconstitutional.

The property sought to be acquired, known as the Cherokee tract, is a large body of land composed of 569 acres adjacent to the present experiment station farm of the University of Tennessee at Knoxville, and lying near the city of Knoxville, as recited in the Enabling Act, chapter 1, Private Acts of 1915.

The said act recites that the tract contains a diversity of soil which will enable Knox county to exhibit and advertise to the world the great diversity of crops which can be produced on its varied soils, as well as demonstrating to the citizens the methods by which the productiveness of this soil and farming lands can be increased, thereby developing the agricultural resources of said county.

The act further recites that the enlargement of the agricultural and experimental station by reason of the acquisition of the additional lands will develop the farming, stock raising, dairying, and other resources of said county, and will enable the said university to educate a larger number of its citizens, and will greatly enhance the value of taxable property in said county, and benefit each and every citizen thereof.

But we may assume that the acquisition of this land by the county court is more especially for the benefit of the State, and yet under our authorities this proposed bond issue may be made by the county and the property purchased with the bonds and transferred to the State of Tennessee for the use of the University of

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Tennessee for educational, experimental, and agricultural purposes.

This question was before the court in the case of *Ransom v. Rutherford County*, 123 Tenn., 1, 130 S. W., 1057, Ann. Cas., 1912B, 1356. That case arose out of a contribution of \$100,000 by Rutherford county, Tennessee, \$80,000 being also given by the municipality of Murfreesboro, for the purpose of having established in said county by the State of Tennessee one of its three normal schools, located in the State. The said county also donated a site for the location of said school. The bonds were issued by the county court and the municipality without submission of the same to the vote of the people. The bond issue was attacked on the same ground as in this case. It was held that the letter and spirit of this provision in the constitution is that the county shall not be a stockholder or joint owner with any company, association, or corporation in any enterprise or improvement; that the mischief it seeks to prevent is a business partnership between a municipality or subdivisions of the State and individuals or private corporations or associations; that it forbids the union of public and private capital in any enterprise whatever. It was observed in that case that the State is a sovereign, and is in no sense a person, company, association, or corporation in the meaning of this constitutional inhibition.

This question was also decided against the contention of complainant in the case of *East Tennessee University v. Knoxville*, 6 Baxt., 176.

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The third and last assignment of error is based upon the question raised by section 8 of complainant's bill that the land is not worth the amount paid for it, the allegation being as follows:

"Sec. 8. Plaintiff avers that the Cherokee land is not worth exceeding \$75,000. He believes and alleges that the county is being burdened with \$50,000 more than said land is really worth, this sum being added to the value of the land as a bonus or profit to some of the promoters."

The defendant demurred to this portion of the bill because the bill shows that the county court exercised its legislative powers and discretion in purchasing the property complained of, and that this legislative power and discretion could not be reviewed by the court upon the complaint of a citizen or taxpayer whose judgment might differ, or who might disagree with the members of the county court.

The bill is not sworn to. It does not charge that the county court has acted in bad faith, or that it has committed, or is about to commit, any unauthorized act. It mildly avers that too much is being paid for the property, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is worth, this going as a profit to the promoters.

This is not sufficient as an attack upon this purchase. in view of the fact that the legislature grants full authority to purchase the lands at the price and for the purpose as previously agreed upon by the county court.

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The act of the legislature is very full, and covers the entire proposition. It recites the contract and grants full authority to carry out the purchase. We are of opinion, and so hold, that the bill is entirely insufficient to enjoin and prevent this enterprise agreed upon by the county court of Knox county and approved by the State through its legislature.

The result is we find no error in the decree of the chancellor in dismissing the bill, and this decree must be affirmed.

Bensdorff v. Uihlein.

BENSORFF *et al.* v. UIHLEIN *et al.*

(Jackson. April Term, 1915.)

1. ADVERSE POSSESSION. Requisites. Inclosure.

The inclosure of property is not necessary to establish adverse possession, where such inclosure is impracticable, but possession of such property may be established by such use and occupation as its nature and character admits. (*Post*, p. 197.)

Cases cited and approved: Pullen v. Hopkins, 69 Tenn., 741; Hicks v. Tredericks, 77 Tenn., 491; Lieberman v. Clark, 114 Tenn., 134; Green v. Coal & Coke Co., 110 Tenn., 35; Sou. Iron, etc., Co. v. Schwoon, 124 Tenn., 176.

Cases cited and distinguished: Garrett v. Belmont Land Co., 94 Tenn., 459; Pullen v. Hopkins, 69 Tenn., 741; Hicks v. Tredericks, 77 Tenn., 492; West v. Lanier, 28 Tenn., 762; Cass v. Richardson, 42 Tenn., 28; Coal Co. v. Coppinger, 95 Tenn., 526.

2. ADVERSE POSSESSION. Inclosure. Lot. "Susceptible." "Possible."

A small triangular lot between two streets and a store, which is principally valuable as a means of access to the store, is not susceptible of inclosure so as to require it to be inclosed in order to support a claim of adverse possession thereto by the storekeeper, since to inclose it would destroy its chief value, and "susceptible," in that rule, is not synonymous with "possible." (*Post*, p. 198.)

Case cited and distinguished: Coal Co. v. Coppinger, 95 Tenn., 526.

3. ADVERSE POSSESSION. Character of possession. Notoriety.

Where the store owner paved the lot first with brick, and then with granolithic paving, and maintained such pavement during the statutory period, his possession thereof was open and notorious and gives him title. (*Post*, p. 199.)

Case cited and approved: Nichols v. Boston, 98 Mass., 39.

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4. ADVERSE POSSESSION. Exclusive possession. Use by public.

The fact that the public, with the store owner's permission, used that pavement as a means of passing from one street to the other, does not prevent his possession from being exclusive, since such use was different in character from that to which he devoted the premises. (*Post*, p. 200.)

Cases cited and approved: *Woodruff v. Langford*, 115 N. W., 1020; *Burrows v. Gallup*, 32 Conn., 493; *Dodge v. Lavin*, 34 R. I., 514.

Cases cited and distinguished: *Calloway v. Sanford*, 35 S. W., 776; *Boulo v. Railroad*, 55 Ala., 480; *Tracy v. Railroad*, 39 Conn., 382.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—WM. F. FITZHUGH, Special Judge.

THOS. A. EVANS, for appellants.

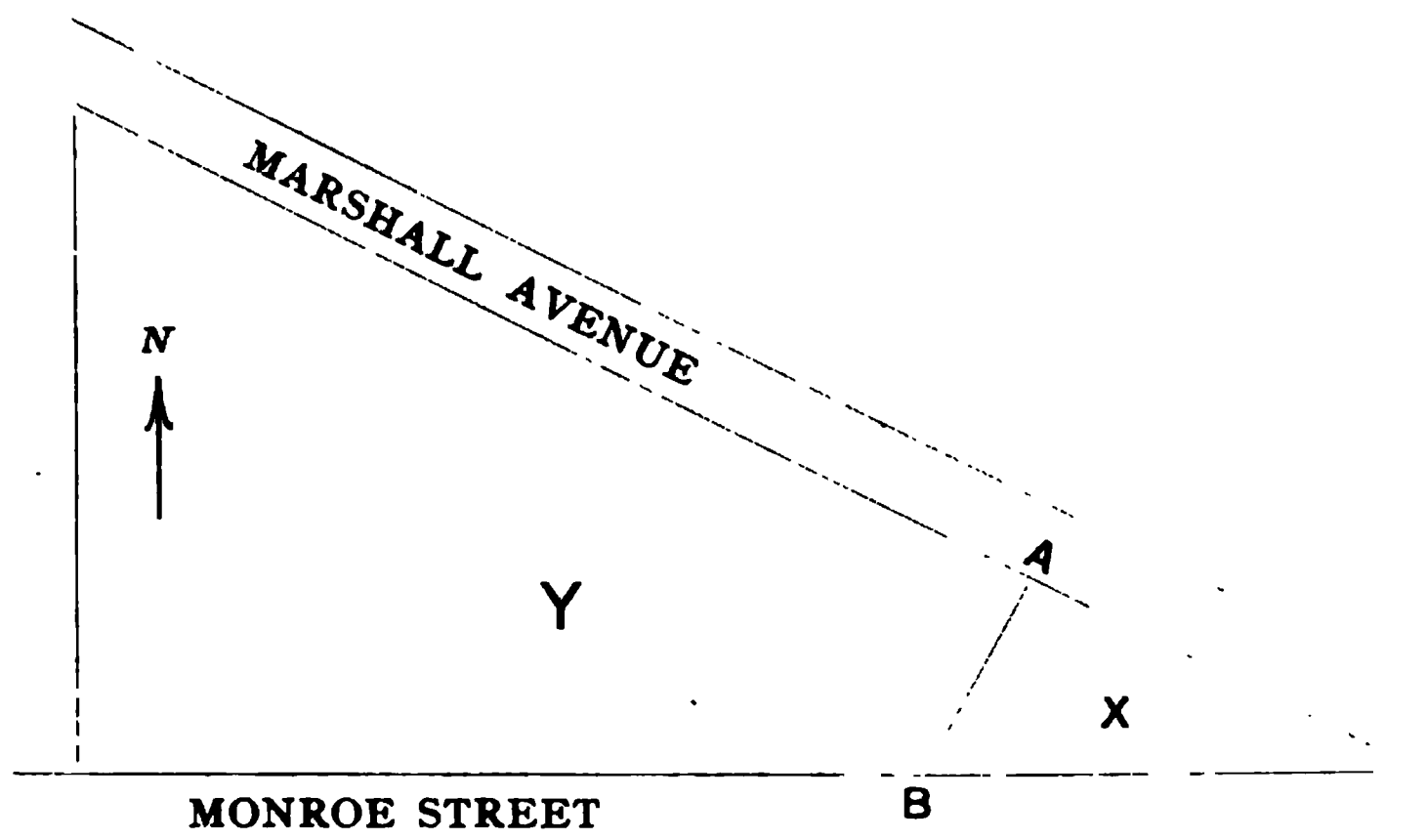
LEHMAN, GATES & MARTIN, for appellees. .

MR. JUSTICE GREEN delivered the opinion of the Court.

This is an ejectment suit brought to recover a triangular lot west of the point of intersection of Marshall avenue and Monroe street, in the city of Memphis. The land in controversy is indicated by the letter "X" on the diagram, and is an apex of a triangle formed at this crossing. The base of the triangle is twenty-one and one-half feet. It runs along Marshall avenue thir-

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ty-seven and one-half feet, and along Monroe street forty-seven and one-half feet. The diagram follows:



The lot marked "Y" on the diagram is occupied by a building owned by the defendants herein. This lot came into their possession some time prior to 1902.

Complainants assert what is probably a good paper title to the lot, marked "X" on the diagram, herein sued for. Defendants rely on adverse possession, and interpose a plea of the statute of limitations.

The lot X was formerly a part of the right of way of a suburban railway. The operation of this railroad was discontinued some years ago, and the tracks were taken up, and, so far as the railroad company is concerned, the particular lot of land in controversy has been abandoned for many years.

After the defendants had erected their building on lot Y, and the railroad company had taken up the tracks over lot X there remained an unoccupied space between

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the line A B and the apex of the triangle at the intersection of Marshall avenue and Monroe street. Defendants' building had a front along the line A B, in which a door was placed. The lot immediately in front of this door, being unoccupied and rough by reason of the tearing up of the tracks, got into bad condition, was muddy, and pools of water stood in it. The city authorities, supposing that lot X was a part of the property of the defendants, ordered them to put it in better condition. They demurred at first, on the plea that the lot was not their property, but finally agreed to take charge of it, and in the year 1902 covered the whole of this lot with a brick pavement. It was the idea of defendants, according to the testimony of their agent, that the paving of the apex of this triangle in front of the east entrance to their storehouse would make their property more accessible and add to its value. The lot appeared to have been abandoned, and defendants thought that by taking possession of it they could finally acquire title thereto.

From 1902 until the filing of this bill on November 17, 1913, the defendants kept up this paving over the entire surface of the lot. They repaired the pavement from time to time, and finally took up the bricks and covered the lot with a granolithic pavement. Defendants all the while used this lot as an entrance to their storehouse, kept up the pavement, and otherwise asserted ownership and dominion over the same.

Upon the facts stated, it is insisted by defendants that they have had seven years' open and adverse pos-

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session of the triangle in suit, and that complainants' action is accordingly barred. We think this contention on the part of the defendants is well made.

Complainants rely on the fact that there was no inclosure of lot X, and the statement of this court in *Garrett v. Belmont Land Company*, 94 Tenn., 459, 466, 29 S. W., 726, that:

“There must be actual inclosure, whenever the property is susceptible of such inclosure, in order to make out a case of adverse possession of town lots.”

For support of this proposition the court cited *Pullen v. Hopkins*, 1 Lea., 741; *Hicks v. Tredericks*, 9 Lea, 492.

In the case of *Garrett v. Belmont Land Company*, supra, the court was dealing with vacant lots in the suburbs of Nashville. These lots were not suitable for business purposes, there were no buildings upon them, and, owing to their nature and location, there was no practical way in which adverse possession could have been indicated save by inclosure. The court only intended to say that inclosure of such lots as these was necessary to make out a case of adverse possession, and did not mean to say that there must be an inclosure of every city lot to establish adverse possession.

In the case of *West v. Lanier*, 9 Humph., 762, this court said, after reviewing the authorities:

“From these cases it will be seen that an inclosure or residence on land is unnecessary, in order to constitute possession, but that such use and occupation of it as from its nature and character it is susceptible,

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under a claim of ownership, will be an actual possession.” *West v. Lanier*, 9 Humph., 762.

In the case of *Cass v. Richardson*, 2 Cold., 28, it was held that the erection and use of a wash place to wash iron was not sufficient to constitute actual possession, the court saying that in general a building or inclosure of some sort was necessary, but that exceptions existed where the land was unfitted for residence or cultivation, as, for example, an ore bank, a coal ravine, a sand pit, stone quarry, or a meadow below tidewater.

In the case of *Coal Co. v. Coppinger*, 95 Tenn., 526, 32 S. W., 465, it was said that possession of land, to be actual, must be by inclosure, if practicable; otherwise by that use of which the premises were susceptible.

The authority of the cases referred to is recognized in many other decisions of this court, and the law is well settled that inclosure is unnecessary to establish actual possession where such inclosure is impracticable, but possession may be established by such use and occupation as the land, from its situation, nature, and character, admits. *Pullen v. Hopkins*, 1 Lea, 741; *Hicks v. Tredericks*, 9 Lea, 491; *Lieberman v. Clark*, 114 Tenn., 134, 85 S. W., 258, 69 L. R. A., 732; *Green v. Coal & Coke Company*, 110 Tenn., 35, 72 S. W., 459; *Sou. Iron, etc., Co. v. Schwoon*, 124 Tenn., 176, 135 S. W., 785.

It is urged on behalf of complainants that the lot “X” is capable of inclosure. This in a sense is true. As a matter of course, a fence could be built around this triangle. Such lots, however, are not ordinarily in-

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closed, and, in fact, an inclosure would practically destroy the value of the lot for the very purpose for which it is best adapted.

We are not willing to give the construction to the word "susceptible," as used in our cases, which is insisted upon by the complainants. It is possible to inclose any property, but this court has never meant to say that "susceptibility" and "possibility" were convertible terms in defining adverse possession. It has never been intended to hold that inclosure was necessary, and that land was susceptible of inclosure if the inclosure would destroy the land for the purposes for which it was best suited. The meaning of our cases, as intimated in *Coal Co. v. Coppinger*, 95 Tenn., 526, 32 S. W., 465, is that there should be an inclosure when practicable—when the land is practically susceptible to inclosure.

The idea underlying the whole doctrine of adverse possession is that the possession should be maintained in an open and notorious manner, so as to warn the true owner that a hostile claim is being asserted to his land. We think the possession in this case was plain, open, and notorious, and amply sufficient to put the owner of this property on notice. The triangular space in litigation was entirely within the paving lines of the two intersecting streets. The space was twenty-one and one-half by thirty-seven and one-half by forty-seven and one-half feet. Covering so large a space as this with brick paving, and later with granolithic paving, was an unusual occurrence. Such a space as this in-

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side of property lines would not ordinarily be paved, and the placing of the pavement thereupon unmistakably indicated that some one was claiming the land, improving it, and asserting dominion over it.

The case is similar to one where a wharf is built over lands covered by water. The building and use of a wharf in this way is held to be a disseisin of the land under the wharf. 2 C. J., 72; *Nickols v. Boston*, 98 Mass., 39, 93 Am. Dec., 132.

It is urged, however, by the complainants, that the defendants have never had any exclusive possession of this land, but that their occupation thereof was in common with the occupation of the public, and for that reason their possession was not such as to constitute the basis of a title by adverse possession. For this proposition we are referred to 1 Cyc., 1024; *Calloway v. Sanford* (Ch. App.), 35 S. W., 776; *Boulo v. Railroad*, 55 Ala., 480; *Tracy v. Railroad*, 39 Conn., 382.

These authorities and others collected in 2 C. J., 121, are to the effect that use and occupation of property in common with the public and with others will not constitute exclusive adverse possession.

We think the authorities, however, are not pertinent to this case. The use and occupation of this triangular corner made by the defendants and the use and occupation thereof enjoyed by the public were not common uses.

The triangle was used by the public merely as a pass-way. Persons turning around this corner of Monroe street and Marshall avenue crossed the lot.

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Defendants, however, used the lot as an attractive, paved, and commodious entrance to their storehouse. No other person had a store fronting on this lot. No other person used the lot for the same purposes that defendants used it. No other person put the lot to the use to which it was best adapted.

The public and the defendants used the lot in an altogether different manner. There was nothing in common between the use of the defendants and the use of the public.

The use made of this lot by the public was under license, and a mere permissive use will not destroy the exclusiveness of an adverse claimant's possession. 2 C. J., 122; *Woodruff v. Langford* (Iowa), 115 N. W., 1020; *Burrows v. Gallup*, 32 Conn., 493, 87 Am. Dec., 186; *Dodge v. Lavin*, 34 R. I., 514, 84 Atl., 857.

It is quite a common thing to truncate the apices of business houses at the intersection of city streets. Such architecture makes an attractive entrance, directly on the corner, equally accessible to both streets, and increases the value of the property. A triangular space is always left between the pavements proper and the truncated portion of the building when this course is adopted. The triangular space is paved and the public passes over the exposed triangle in turning the corner. It would not do to hold that an owner who thus improves his property has his possession destroyed or impaired by the license or permission which he gives the public to turn street corners over his land. There is no sound basis upon which such an idea could rest.

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In these cases the keeping and maintaining of a pavement over land so located is a sufficient indication of possession. The use of such land as a store entrance and the paving thereof is the ordinary use to which lands similarly located are put by other owners. Such use is the primary use. The owner invites the public to pass as close to the door of his business house as possible. The value of the house depends upon its accessibility to the public, but the passage of the public over such an exposed triangle is by the owner's permission, and does not affect his possession.

The chancellor's decree will be reversed, and the bill dismissed.

State v. White.

STATE v. WHITE.

*(Jackson. April Term, 1915.)***1. INTOXICATING LIQUORS. Offenses. Sentence and punishment. "At the discretion of the court." "And." "Or."**

Under Acts 1905, ch. 422, sec. 1, making it unlawful to buy for another any intoxicating liquors within four miles of any schoolhouse, and the violation thereof a misdemeanor, punishable upon conviction by a fine "and imprisonment for a period of not less than thirty days nor more than six months, at the discretion of the court," the conjunction "and," while ordinarily expressing the relation of addition, has the meaning "or," and the words "at the discretion of the court" give the court a discretion as to whether imprisonment shall be assessed. (*Post*, p. 205.)

Acts cited and construed: Acts 1905, sec. 1.

Constitution cited and construed: Art. 6, sec. 14.

2. CONSTITUTIONAL LAW. Statutes. Construction to sustain validity.

In cases of doubt, the court will give that construction to an act which will sustain its validity and constitutionality, instead of destroying it, when that can reasonably be done. (*Post*, p. 206.)

3. JURY. Right to jury. Assessment of punishment. "Court."

In Acts 1905, ch. 422, sec. 1, punishing sales of liquor near a schoolhouse by a fine of not less than \$10 or more than \$100, at the discretion of the court, the word "court" includes both court and jury, so that provision for fine for as much as \$100 does not violate Const. art. 6, sec. 14, requiring fine of more than \$50 to be assessed by jury. (*Post*, p. 206.)

Cases cited and approved: *Railroad v. Crider*, 91 Tenn., 490; *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn., 729.

Case cited and distinguished: *Morton v. State*, 91 Tenn., 439.

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FROM CROCKETT.

Appeal from the Circuit Court of Crockett County.—
THOS. E. HARWOOD, Judge.

W. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

No council of record for defendant.

MR. JUSTICE FANCHER delivered the opinion of the
Court.

The defendant, Arch White, was convicted of the offense of unlawfully buying for another intoxicating liquors within four miles of a schoolhouse, which is a violation of Acts 1905, chapter 422. Judgment was rendered upon the verdict of the jury that the defendant pay a fine of \$30 and the costs of the case.

The judgment recites that the “court declines to assess any confinement of the defendant,” to which action of the court in refusing to assess at least as many as thirty days’ confinement, according to said act of 1905, the attorney-general on behalf of the State excepted and prayed an appeal to the present term of this court. Section 1 of said act is as follows:

“Be it enacted by the general-assembly of the State of Tennessee, that hereafter it shall be unlawful for any person to buy for another any intoxicating liquor from any person within four miles of any schoolhouse,

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public or private, in Tennessee, where a school is kept, whether the school be then in session or not, and that any one violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine, for each offense, of not less than ten dollars nor more than one hundred dollars, and imprisonment for a period of not less than thirty days nor more than six months, at the discretion of the court.’’

It is stated in the brief of the attorney-general for the State at large that he is of opinion that the trial judge was correct in determining that the imposition of a jail sentence upon the defendant was within his (the trial judge’s) discretion, and not mandatory. However, for the purpose of having the statute construed and the matter determined, the attorney-general assigns as error the action of the trial judge in declining to assess an additional punishment of confinement in the county jail.

We think the trial judge construed the act properly, and that the matter of imprisonment is at the discretion of the court.

This act provides for a fine of not less than \$10 nor more than \$100, and imprisonment for a period of not less than thirty days nor more than six months, at the discretion of the court.

Now, what is meant in this statute by the expression “at the discretion of the court?” It was unnecessary to say that the assessment of a fine from \$10 to \$100 was in the discretion of the court, because that is

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implied, and it is not usual in statutes to add the unnecessary provision that the assessment of the amount of the fine is at the discretion of the court when the act states a maximum and minimum fine. Nor was this expression necessary to make clear that the fixing of the term of imprisonment from thirty days to six months was at the discretion of the court, because the mere statement of a maximum and a minimum imposed a discretion on the court.

These words were not added to the statute for the purpose of putting the discretion in the judge, instead of the jury, for the reason that under such construction this act would be violative of article 6, section 14, of the constitution, which provides that no fine shall be imposed on any citizen of this State that shall exceed \$50, unless it shall be assessed by a jury of his peers. This act provides for a fine as high as \$100.

It is well settled that the court will in cases of doubt give that construction to an act which will sustain its validity and constitutionality, instead of destroying it, when this can reasonably be done.

The fine must be assessed by the jury if it is fixed at over \$50.

So the word "court," as here indicated, is not a designation of the presiding judge, but the term is used in a collective sense, indicating the tribunal before which the conviction should be had, and including both court and jury. *Railroad v. Crider*, 91 Tenn., 490, 19 S. W., 618; *State ex rel. v. Schlitz Brewing Co.*, 104 Tenn., 729, 59 S. W., 1033, 78 Am. St. Rep., 941.

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The conjunction “and,” as here used in the phrase “and imprisonment for a period of not less than thirty days nor more than six months,” would clearly indicate that both fine and imprisonment are imperative, but for the closing phrase, i. e., “at the discretion of the court.” Ordinarily, the word “and” expresses the relation of addition, but it is frequently construed as meaning “or,” provided the context favors the conversion. 2 Cyc., 286.

It therefore becomes necessary, in order to give meaning to the term “at the discretion of the court,” to refer it as granting to the court a discretion as to whether imprisonment shall be assessed.

In *Morton v. State*, 91 Tenn., 439, 19 S. W., 225, the court construed a provision of the statute providing that persons convicted of certain offenses shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not more than one year, and by fine not exceeding \$500, at the discretion of the jury. It was held that the obvious meaning of that statute was that the convict shall be punished either by imprisonment in the penitentiary without more, or by imprisonment in the county jail and fine; and whether the one mode or the other shall be adopted is left to the discretion of the jury. It was clear in that case that the conjunction “and” indicated an imperative double punishment of fine and imprisonment, and the discretion there given was as to whether the punishment should be a penitentiary sentence alone, or whether it should be by fine and im-

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prisonment. Thus the words in that act were given a distinct meaning. The words were not useless, but served a purpose in indicating a discretion in the two modes of punishment. That statute applied to felonies, but the jury was given a discretion as to whether they would sentence the offender to the penitentiary or whether he would be committed to jail.

In the present case the provision giving a discretion to the court would be useless unless it is referred to the discretion as to whether imprisonment shall be added to the punishment by fine.

We are constrained to find that this is the legislative intent or meaning of the words also from the nature of this offense.

It is no crime at all under our law for an individual to buy intoxicating liquor for himself, and before the enactment of this statute, when acting in good faith, any person could buy intoxicating liquor for another. But the legislature, in order to further strengthen and fortify the four-mile law in this State, which has been a progressive law, intended here to punish those who aided in the procurement of intoxicating liquors by buying for another.

We think a discretion should be and was given to the court as to whether upon a conviction for this new offense, imprisonment should be imposed. If the facts indicated that the purchasing of whisky was by a bootlegger or violator of the temperance laws, it might become very necessary that he be given a jail sentence in addition to a fine. But if it were a mere technical

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violation, one person acting thoughtlessly for the accommodation of another person without evil intent, it might be an inhuman thing to visit upon him a jail sentence. Evidently that was the case in the present instance. Arch White was convicted and fined \$30, but the court declined to assess any imprisonment, exercising a discretion not to do so. We assume that the merits of the case prompted this action on the part of the court.

Therefore, in giving the act the construction we have, we enable the court to carry out the provisions of the law in a reasonable and humane way without excessive or extreme punishment being inflicted; we give meaning to the words "at the discretion of the court," which without this construction would serve no purpose. We also render the act valid and constitutional when we hold that the discretion of the court does not refer to a discretion of the judge, as distinguished from that of the jury, thus rendering valid that provision of the act which allows a fine of as much as \$100.

The assignment of error is therefore overruled, and the judgment of the circuit court affirmed.

Shaw v. Cole Mfg. Co.

SHAW v. COLE MFG. Co. *et al.* (Two Cases).

(Jackson. April Term, 1915.)

CORPORATIONS. Directors. Nature of relation. Purchase of stock.

Directors may purchase stock from stockholders in a corporation, and do not, in making such purchases, occupy a fiduciary relation; hence, where there was no fraud or concealment, the stockholders cannot recover, though they sold their shares at much less than their actual value.

Cases cited and approved: *Stewart v. Harris*, 2 Ann. Cas., 873; *Strong v. Repide*, 213 U. S., 419; *Percival v. Wright*, 4 British Ruling Cases, 792; *Stewart v. Harris*, 69 Kan., 498; *Crowell v. Jackson*, 53 N. J. Law, 656; *Rothchild v. M. & C. R. R. Co.*, 113 Fed., 476; *Gillet v. Bowen*, 23 Fed., 626; *Walsh v. Goulden*, 130 Mich., 531; *Board of Com'rs v. Reynolds*, 44 Ind., 509; *Haarstick v. Fox*, 9 Utah, 110; *Twin Lick Oil Co. v. Marbury*, 91 U. S., 588; *Jackson v. Ludeling*, 21 Wall., 616.

Cases cited and distinguished: *Steinfeld v. Nielsen*, 12 Ariz., 381; *Oliver v. Oliver*, 118 Ga., 362; *Deaderick v. Wilson*, 67 Tenn., 108.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Judge.

H. N. LEACH and D. B. NEWSOM, for appellants.

JACKSON & McREE and WRIGHT & WRIGHT, for appellees.

Shaw v. Cole Mfg. Co.

MR. SPECIAL JUSTICE WILSON delivered the opinion of the Court.

These were suits brought by the Shaws for the purpose of recovering from defendants the difference between the sale price and the fair market price of shares of stock in the Cole Manufacturing Company, a finishing lumber mill, sold by the Shaws to W. I. Cole and T. R. Winfield; the first sale in March, 1907, and the latter in September, 1908.

Cole acted for himself and as Winfield's agent in buying the stock, and the representations complained of were made by him. Cole and Winfield were both directors and officers in the Cole Manufacturing Company.

We find:

1. The charge that dividends were suppressed, in order to obtain this stock, is not sustained, for the reason that the books, records, and condition of the company show that the company was not in financial situation to justify the payment of dividends at the times they were passed, until after the Shaws consummated the sales.

2. The evidence does not convince us, nor establish, that either of the Shaws was induced to make the sales by any misrepresentation of either defendant. Nor was there shown any concealment, or attempt at concealment, or suppression, of any material fact. The evidence does not convince us that any deceit was practiced which imposed on either complainant.

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3. No special relation of trust and confidence was shown. Nor was it proven that special reliance was imposed by the sellers in the buyers. A memorandum more fully giving the reasons for these conclusions was filed.

4. It was suggested in argument, however, that as the book value of the shares, as shown by the books, and the value of its real estate, largely exceeded the price paid and market value or sale prices discussed, the purchasers could not buy from these stockholders without the fullest disclosure to them of all the facts, giving the stock value, because as directors they owed the Shaws the duties of a trustee to his beneficiary.

It is to be noted that the Shaws were fully aware they were dealing with officers and directors of the company.

While directors occupy a trust relation to the corporation which they direct, their duty does not apply to the stockholder in the sale and purchase of stock. Dealing in its own stock is not a corporate function. In buying or selling stock, directors may trade like an outsider, provided they do not affirmatively act or speak wrongfully, or intentionally conceal facts with reference to it. There is also the qualification that no other relation of trust exists between the parties.

This is the holding of a number of the British courts and the appellate courts of the States of New York, New Jersey, Illinois, Indiana, Michigan, Iowa, Pennsylvania, Rhode Island, Louisiana, Washington, and Utah.

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See note to *Stewart v. Harris*, 2 Ann. Cas., 873; note to *Strong v. Repide*, 213 U. S., 419, 29 Sup. Ct., 521, 53 L. Ed., 853; note to *Percival v. Wright*, 4 British Ruling Cases, 792, where the authorities are collated.

Authorities are cited and quoted which hold that such trust relation exists, but when analyzed they are very few. *Stewart v. Harris*, 69 Kan., 498, 77 Pac., 277, 66 L. R. A., 261, 105 Am. St. Rep., 178, 2 Ann. Cas., 873, supports this view in its entirety. So does the case of *Steinfeld v. Nielsen*, 12 Ariz., 381, 100 Pac., 1094.

Subsequently, on a new hearing reported in 15 Ariz. 444, 139 Pac., 888, the supreme court of Arizona, modified the opinion of the territorial court, while holding the special facts established a trust relation. It said:

“The general rule is that an officer or director may purchase the stock of his company from stockholders with the same freedom as a stranger, and, in so doing, the fact that he may be possessed of inside information as to the future plans and policies of his company is not permitted to militate against him, ‘and, so long as he remains silent and does not actively mislead the person with whom he deals, the transaction cannot be set aside for fraud.’ Cook on Corporations (5 Ed.), par. 320, page 707. *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl., 426; *Rothchild v. Memphis & Charleston R. R. Co.*, 113 Fed., 476, 51 C. C. A., 310; *Gillet v. Bowen* (C. C.), 23 Fed., 626; *Walsh v. Goulden*, 130 Mich., 531, 90 N. W., 406; *Board of Com’rs v. Reynolds*, 44 Ind., 509, 15 Am. Rep., 245; *Haarstick v. Fox*, 9

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Utah, 110, 33 Pac., 251; *Deaderick v. Wilson*, 67 Tenn. (8 Baxt.), 108; 2 Story's Eq., par. 1564; 4 Thompson on Corporations (2 Ed.), par. 4031."

Strong v. Repide did not sustain the trust relation as existing in the purchase of stock by directors from stockholders, but for the purpose of the discussion recognized that ordinarily the trust relation did not exist, holding, however, the case exceptional, because of special facts of exclusive information of the managing director, who was in that case the purchaser, coupled with the fact of his insidious and careful concealment that he was, in fact, the real purchaser.

In *Oliver v. Oliver*, 118 Ga., 362, 45 S. E., 232, the trust relation was limited in its application to special information from the position, and where the court, in dealing with the duty of the director to disclose knowledge of the difference between the book value and the contract or market price of the stock, said:

"If the market or contract price of the stock should be different, from the book value, he (the director) would be under no legal obligation to call special attention to that fact; for the stockholder is entitled to examine the books, and this source of information, at least theoretically, is equally accessible to both."

Twin Lick Oil Co. v. Marbury, 91 U. S., 588, 23 L. Ed., 328, and *Jackson v. Ludeling*, 21 Wall., 616, 22 L. Ed., 492, cited for the minority view declaring the trust relation, were cases which involved the purchase by directors of the corporate property, not its shares of stock, and naturally the directors are in the attitude

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of trustees of the corporation's assets and property, which is an entirely different question from their relation to the shares of corporate stock.

Tennessee long since aligned itself with the vast majority of American decisions upon the subject, holding that a director in the purchase of the corporation stock does not owe the stockholder from whom he purchases the duties of a trustee to a beneficiary.

This was in *Deaderick v. Wilson*, 8 Baxt. (67 Tenn.), 108, followed in the memorandum opinion of this court in *H. S. Shaw v. Thos. R. Winfield*, decided at Jackson, at the April term, 1914.

The latter case is similar to the instant case in all its essential elements. Its decision would be controlling in the disposition of these causes; but we have carefully gone over the ground, in deference to earnest presentation by able counsel.

Much as courts of justice prefer that trades should be conducted on equal terms, with fair results, they cannot take from persons of full age their right to contract, nor upset their transactions without full proof of actual misrepresentation or concealment. So to do would unreasonably retard commercial dealings, and impair rather than improve the business welfare. Equally as strong is the duty to relieve seasonably against fraud when convincingly established. The latter is not the case before us.

On the whole record, in the instant case, it appears that these parties, in their anxiety to turn unproductive stock into concrete cash, sold it to unsentimental

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and firm traders at much less than its ultimate value, because they could find no higher bidder.

The charges of fraudulent inducements to sale are not made out, and the chancellor's decree, dismissing both bills, will be affirmed.

The costs of appeal are taxed to the appellants, to be equally borne in each case.

JULIAN C. WILSON, Special Justice, sat in lieu of Hon. A. S. BUCHANAN, regular Judge, who was incompetent in these cases.

Casualty Co. v. Parsons.

GREAT EASTERN CASUALTY CO. v. PARSONS.

*(Jackson. April Term, 1915.)***EXCEPTIONS, BILL OF. Insertion of exhibits. Authentication.**

Papers identified and made exhibits to the respective depositions by the notary public taking them, need not be identified or authenticated by a chancellor or trial judge in order to their incorporation into a bill of exceptions, as this is sufficiently done by the identifying signature of the notary public incorporating them as part of the deposition.

Case cited and approved: Southern Ins. Co. v. Anderson, 130 Tenn., 482.

FROM SHELBY.

Error to the Circuit Court of Shelby County—A.
B. PITTMAN, Judge.

WILSON & ARMSTRONG, for plaintiff in error.

GREER & GREER, for defendant in error.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The court of civil appeals arrived at a correct result in this case, but in its opinion was embodied an erroneous ruling on a question of practice.

The bill of exceptions preserved in the court of trial, on appeal to the appellate court, contained a recital

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in regard to each deposition that it was read in evidence, followed by the deposition including its exhibits. These exhibits showed that they were identified and made exhibits to the respective depositions by the notary public taking same.

Papers thus exhibited need not be identified or authenticated by a chancellor or trial judge in order to their incorporation into a bill of exceptions. This is sufficiently done by the identifying signature of the notary public incorporating them as parts of the depositions. The trial judge should not be onerated with the duty of going into the detail work of looking up such documents and formally identifying same.

Nothing said by this court in *Southern Insurance Co. v. Anderson*, 130 Tenn., 482, 172 S. W., 318, is subject to a construction that sustains a ruling to the contrary of what we here indicate to be a proper practice.

Writ granted, and after the modification touching the ruling referred to, the judgment of the court of civil appeals is affirmed.

State ex rel. v. Kirk.

STATE *ex rel.* OVERALL *v.* KIRK.

(*Jackson.* April Term, 1915.)

BASTARDS. Proceedings. Jurisdiction of justice.

Shannon's Code, sec. 7332, provides that any justice of the peace upon his own knowledge, or information made to him, that any single woman within his county is delivered of a living child, may cause such woman to be brought before him for examination touching the father. Sections 7333 and 7334, respectively, provide means for ascertaining the name of and summoning the putative father, while section 7344 recites that the proceeding is to relieve the county of the support of the child. Section 7347 declares that the county court shall make no provision for a bastard, except when likely to become a county charge. The mother of an illegitimate child removed from one county to another shortly after its birth. *Held*, that a justice of the county to which she removed had jurisdiction of the proceeding to compel the putative father to support the child.

Case cited and approved: *Edmonds v. State*, 24 Tenn., 95.

Case cited and distinguished: *Duffles v. Stake*, 7 Wis., 672.

FROM GIBSON.

Appeal from the Circuit Court of Gibson County—
THOS E. HARWOOD, Judge.

COOPER & CLARK, for the State.

WALKER & LANDRUM, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

State ex rel. v. Kirk.

This is a bastardy proceeding, begun on the relation of Emma Overall, before a justice of the peace in Gibson county, and removed thence in orderly course to the county court and then to the circuit court of that county. Defendant Kirk was charged with being the father of an illegitimate child born to the relator in Dyer county, just across the Gibson county line, and it was averred that, when the child was eleven days old, relator removed with her father and the infant into Gibson county, where they have since resided, and where the child, it was averred, was likely to become a charge on Gibson county; the mother and the child having no property.

The circuit judge sustained a motion to dismiss the proceeding on the ground that the courts of Gibson county were without jurisdiction, for that the child was not born in that county. An appeal was prosecuted from the judgment of dismissal, and the sole error assigned challenges the correctness of that ruling.

The Code provisions relating to bastardy proceedings, which on construction are to govern our decision, are as follows:

“Sec. 7332. Any justice of the peace, upon his own knowledge, or information made to him, that any single woman within his county is delivered of a living child, may cause such woman, at any time after the expiration of thirty days from the delivery, to be brought before him to be examined on oath touching the father

“Sec. 7333. If, upon such examination, she refuses to declare the father, she shall be required to give suf-

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ficient security to keep such child from being chargeable on the county, or be committed to jail until she declare the father or give the security required, or is otherwise discharged by law.

“Sec. 7334. But if she, upon oath, accuse any man of being the father of such illegitimate child, either at the examination referred to in the preceding section or upon voluntary complaint before or after the birth of the child, the justice shall issue a warrant against such person, and cause him to come before him.”

“Sec. 7344. The proceedings in bastardy are conducted in the name of the State as plaintiff and the accused as defendant, and are intended for the indemnity of counties against the charge of supporting bastards.”

“Sec. 7347. But the county court shall make no provision for a bastard, except when he is . . . likely to become a county charge.”

The counsel of appellee Kirk lays stress upon that clause of section 7332 to the effect that when “any justice of the peace” has “information, . . . that any single woman within his county is delivered of a living child,” as indicating that the child must be born in the county to support jurisdiction.

It is further insisted by appellee, the reputed father, that an early decision of this court (*Edmonds v. State*, 24 Tenn. [5 Humph.], 95) so holds. That decision, from language used, may be thought to be subject to that construction, but we are persuaded that such is

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not the true construction of the opinion in that case. The affidavit of the mother in that case disclosed "only the fact that Joel Edmonds was the father of a bastard child, of which she was delivered on the 6th day of February, 1840," and it appeared that "it is stated in no part of the proceedings that the child was born in the county of Jefferson, or that the county is legally chargeable with its support." The court, after quoting from the old English statute of 18 Elizabeth in relation to bastardy proceedings, said:

"Now, under this statute, the order of the county court of the county comes in place of the order of the two justices under the statute of Elizabeth, and the same certainty must be required in the one that has been adjudged to be required in the other. We have seen that under the statute of Elizabeth the place of the birth must be set forth in the order made by the justices; so it must be in the order made in the county court, and for the same reasons, viz., that it may appear that the county court had jurisdiction, and that the child was born in the county to which the relief was ordered."

In the ordinary case the child is resident where born, and the place of birth was treated, as we construe the decision, as the place where the child was and where it was likely to become a charge on the county.

In this case, we cannot hold that the courts of Gibson county are without jurisdiction merely because the child was born across the Dyer county line.

The rule in other jurisdictions is that the place of

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birth of the child is in such proceedings held to be immaterial. 5 Cyc., 645.

By the terms of section 7334, the proceeding may be commenced before the birth of the child. Assume that the mother had removed to Gibson county before the birth of the child, after beginning a proceeding in Dyer county, would that proceeding be ousted by the fact that the birth occurred in Gibson county?

Assume that the mother had been at all times a resident of Gibson county, and that, in order to hide her shame temporarily, she had gone into Shelby county for her lying-in, after which she had returned with her child to Gibson county. Can it be maintained that the courts of the latter county are without jurisdiction to protect that county against the expense of the support of the child? Must that county be forced to borrow and use the judicial machinery of Shelby county, and work out its protection at the expense in so far of Shelby county? Must Gibson county in such a case take only such measure of security as the county court of another and distant county may, without due facilities to ascertain what is needed, award? What concern would the county court of Shelby county have for the ample protection of Gibson county?

It has been noted that, by the express terms of section 7344, the proceeding is one in behalf of the county and intended for the county's indemnity touching the support of the child.

Assume that the woman, instead of going, for the purpose indicated, into another county of this State,

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should go into another State and return with the child following its birth to the county of her residence. Can it be that, merely because the child was born in another State, the courts of this State are deprived of jurisdiction; and that the county of this State about to be burdened with the maintenance of the child is remediless? We must withhold assent to any doctrine which would lead to such results.

In the case before us, the mother and the child are in Gibson county as residents; and the record by fair inference shows the putative father to reside in that county. But, whether this be true or not, the county of Gibson as the beneficiary party, so designated by statute, as a corporate entity is there. Why should the courts of that county be held useless in respect of the matter of awarding relief?

As was well said by the supreme court of Wisconsin in *Duffies v. State*, 7 Wis., 672.

“What difference can it make to any county or town in this State, which is about to be burdened with the support of an illegitimate pauper child, whether the child were begotten and born in such county or town or in England or Germany? If the father is within the State, where he can be made amenable to our laws, and in a town or county where the child is likely to become a charge, it is right and proper that he should support his own offspring, and the law will compel him to do so.”

We hold the ruling of the trial judge to have been erroneous. Reversed and remanded for trial.

Davis v. Solari.

*DAVIS et al. v. SOLARI et al.**(Jackson. April Term, 1915.)***1. TENANCY IN COMMON. Purchase by tenant in common. Effect.**

A tenant in common cannot, as a general rule, purchase the common property at a tax or foreclosure sale, or purchase an outstanding title, except for the benefit of all the tenants. (*Post*, p. 227.)

Cases cited and approved: *Tisdale v. Tisdale*, 34 Tenn., 596; *Williams v. Gldeon*, 54 Tenn., 617; *Sharp v. Williams*, 1 Sh. Tenn. Cas., 76; *Saunders v. Woolman & Co.*, 75 Tenn., 300; *Harrison v. Winston*, 2 Tenn. Ch., 544; *Watson v. Ryan*, 3 Tenn. Ch., 40.

Cases cited and disapproved: *King v. Rowan*, 57 Tenn., 675; *Keele v. Cunningham*, 49 Tenn., 288.

2. PARTITION. Order of sale. Purchase by tenant in common. Validity.

Under Shannon's Code, sections 5010, 5025, 5040, 5042, 5051, 5052, 5915, authorizing partition and the settlement by decree of the rights of the parties, and providing that a confirmation of sale divests title, a tenant in common filing a petition to sell for partition may purchase the property at a sale ordered by the court, in the absence of any fraud. (*Post*, p. 227.)

Cases cited and approved: *Collins v. Smith*, 38 Tenn., 251; *Tynes v. Grimstead*, 1 Tenn. Ch., 510; *Blackmore v. Shelby*, 27 Tenn., 439; *Elrod v. Lancaster*, 39 Tenn., 571; *Ex parte Crump*, 84 Tenn., 732; *Whitely v. Whitely*, 117 Md., 538; *Melcher v. N. O. & N. E. R. Co.*, 134 La., 951; *Credle v. Gaugham*, 152 N. C., 18; *Conner v. McCoy*, 83 S. C., 168; *Peck v. Lockridge*, 97 Mo., 549; *Rogers v. Rogers*, 42 S. W., 70.

Cases cited and distinguished: *Thompson v. Frew*, 107 Ill., 478; *Bayhi v. Bayhi*, 35 La. Ann., 527; *Porter v. Depeyster*, 18 La., 132 Tenn.15

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351; Hopper v. Hopper, 79 Md., 400; Carpenter v. Carpenter, 131 N. Y., 101; English v. Monypeny, 6 Ohio Cir. Ct. R., 554.

Code cited and construed: Sec. 5010 (S.).

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

R. H. STICKLEY, for appellants.

D. B. NEWSOM, GEO. A. CANALE, RANDOLPH & RANDOLPH and W. G. CAVETT, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

On July 4, 1885, Lorenzo Solari filed his bill in the chancery court of Shelby county against his sisters and the husbands of those who were married to sell, for the purpose of partition, a storehouse and lot on Beale street, in the city of Memphis, which he and his sisters had inherited from their deceased mother, Esther Solari. A decree of sale was duly entered in that cause, and under and pursuant to that decree Lorenzo Solari became the purchaser, and the sale was confirmed, and the title divested out of his sisters and vested in him. Twenty-one years thereafter one of his sisters, Mrs. Maria Davis, filed the bill in the present case against him, making the other sisters and their husbands defendants along with the said Lorenzo. Subsequently

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Mrs. Davis died, and the cause was revived in the name of her heirs at law. In this proceeding it is insisted, among other things, that Lorenzo's purchase must, in equity, be treated as having been made, not for himself alone, but for his sisters as well; in short, that he holds as trustee, to the extent of the interests which his sisters inherited from their mother, and that their rights should be so declared.

The contention is that, inasmuch as tenants in common, and particularly coparceners, are trustees for each other, one cannot assume an adverse relation and become the purchaser under a decree of sale for partition.

In our judgment, this contention is a misapplication of the doctrine that persons so related cannot buy in the common property at a tax sale, or foreclosure sale, or buy in an outstanding title or other overhead claim, except for the benefit of all. This is the doctrine of *Tisdale v. Tisdale*, 34 Tenn. (2 Sneed), 596, 64 Am. Dec., 775; *Williams v. Gideon*, 54 Tenn. (7 Heisk.), 617; *Sharp v. Williams*, 1 Sh. Tenn. Cas., 76; *Saunders v. Woolman & Co.*, 75 Tenn. (1 Lea), 300; *Harrison v. Winston*, 2 Tenn. Ch., 544; *Watson v. Ryan*, 3 Tenn. Ch., 40. There are some exceptions, however, as shown in *King v. Rowan*, 57 Tenn. (10 Heisk.), 675, 682; *Keele v. Cunningham*, 49 Tenn. (2 Heisk.), 288.

The foregoing cases, however, have no bearing upon a purchase at a sale made through the court of chancery, or through any other court having jurisdiction

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of the matter, for the purpose of effecting a partition. Our Code provisions make this point perfectly clear.

Shannon's Code, section 5010, shows who may have a partition. That section reads:

“Any person having an estate of inheritance, or for life, or for years, in lands, and holding and being in possession thereof, as tenant in common or otherwise, with others, is entitled to partition thereof, or sale for partition, under the provisions of this chapter.”

“5025. The court, on appearance or default, shall declare the rights, titles, and interests of the parties in the premises, and give judgment that partition be made between such of them as have any right therein, according to such right.”

“5040. The partition thus made is conclusive: (1) On all parties named in the proceedings who have at the time any interest in the premises divided, as owners in fee or as tenants for years or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency in any will, conveyance, or otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in any individual share of the premises, as tenants for years, for life, by the courtesy, or in dower. (2) On all persons interested in the premises who are unknown, to whom notice has been given by publication, as hereinbefore directed. (3) On all persons claiming from such parties or persons, or either of them.”

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“5042. Any person entitled to a partition of premises under the foregoing provisions, is equally entitled to have such premises sold for division, in the following cases: (1) If the premises are so situated that partition thereof cannot be made. (2) Where the premises are of such description that it would be manifestly for the advantage of the parties that the same should be sold instead of partitioned.”

“5051. The rights of the parties shall be settled by the judgment or decree of the court, and the proceeds divided in accordance therewith.

“5052. The court, upon confirmation of the sale, divests title and vests it as in other cases of sale of real estate by decree of court, under the provisions of this Code.”

“5915. The courts of this State having jurisdiction to sell land, instead of ordering parties to convey, may divest and vest title directly by decree, or empower the clerk to make title.”

The articles of the Code upon the subject of partition and sale for partition fall under part. 3, tit. 2, ch. 2. Chapter 3 under the same title is on the subject of the sale of property of persons under disability, and immediately follows the chapter just referred to. Under that chapter a provision occurs as follows, being section 5088 of the Code:

“No guardian, next friend, or witness, in such cause, shall purchase at such sale, or at any time afterwards, until five years from the removal of the existing disabilities; and if any such person should make

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such purchase the original sale shall become void, and the infant or married woman may bring ejectment for the land, as if no sale had been made.”

No such provision appears under the sections devoted to partition and sale for partition, and the absence of such provision, especially in connection with its presence in the subsequent chapter on the same general subject, indicates an intention to omit restrictions as to sales made for partition. Sales made under chapter 3 are based, not on the fact that it is to the interest of joint owners to sell as in sales for partition, but on the ground that it is to the interest of such married woman, infant, or other person under disability that their property should be sold for reinvestment, or for other purposes looking specially to their individual interests. It is in this chapter that the restriction occurs. But in the prior chapter, where the sale is to be made for the purpose of disentangling the interests of persons who are coparceners or tenants in common, no such limitation on the right to buy is imposed.

Neither do our cases impose any such limitation. The only restriction of this kind of which we are aware is one to the effect that one who appears as next friend in a bill filed to effect a sale for partition cannot buy. *Collins v. Smith*, 38 Tenn. (1 Head), 251; *Tynes v. Grimstead*, 1 Tenn. Ch., 510, 511. It has been specifically held that at a sale made for partition even a guardian of one of the minors involved may purchase, but that such purchase should be examined closely to see

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that the guardian gave a full price, and that no prejudice occurred to the interest of his ward. *Blackmore v. Shelby*, 27 Tenn. (8 Humph.), 439. The same thing was held in *Elrod v. Lancaster*, 39 Tenn. (2 Head.), 571, 75 Am. Dec., 749, and *Crump, Ex parte*, 84 Tenn. (16 Lea), 732.

It appears from the article on Partition in Cyc., written by the learned author Mr. A. C. Freeman, that the weight of authority is substantially as set down by our statute on most of the points mentioned. It is said in that article, 30 Cyc., page 188, that suits for partition may be maintained by cotenants of every class, that is, by coparceners, tenants in common, and joint tenants; that a suit for partition is but a compulsory method of acquiring title in severalty to the property subject thereto, which without such suit might have been acquired by voluntary conveyances and releases (*Id.*, 202); that a sale is but a mode of partition, and when a party is entitled to partition, he, if the other facts require it, is to the extent of his estate, entitled to partition by sale (*Id.*, 273); that upon principle an order confirming a judicial sale must be regarded as a judicial affirmance that no reason exists why it should not be carried out and therefore is a final adjudication binding alike on the purchaser and all the parties in interest within the jurisdiction of the court, estops the former from refusing to pay his bid, and otherwise carry out the terms of the sale as confirmed, and the latter from resisting such further steps as may remain to be taken to vest him with the title (*Id.*, 283).

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As to persons who may buy at such sale, it is said in a note on page 275 that the cases considering this question are chiefly those in which the claim was made either that the purchaser was not entitled to bid at all, or, if accepted as a bidder, he must be declared to hold as trustee of such persons to whom he stands in a fiduciary relation, and that under the practice prevailing in England the court may, by its decree, allow a party to bid. The note then proceeds:

“In truth, unless those interested in the sale are allowed to bid, their property might often be sacrificed when they were willing and able to protect it. Hence we apprehend that all the parties and all persons beneficially interested are entitled and should be allowed to bid, and that, too, for their own exclusive benefit. *Thompson v. Frew*, 107 Ill., 478; *Bayhi v. Bayhi*, 35 La. Ann., 527; *Porter v. Depeyster*, 18 La., 351; *Hopper v. Hopper*, 79 Md., 400, 29 Atl., 611; *Carpenter v. Carpenter*, 131 N. Y., 101, 29 N. E., 1013, 27 Am. St. Rep., 569; *English v. Monypeny*, 6 Ohio Cir. Ct. R., 554, 3 O. C. D., 582.”

Other and more recent cases are to the same effect: *Whitely v. Whitely*, 117 Md., 538, 84 Atl., 68; *Melcher v. N. O. & N. E. R. Co.*, 134 La., 951, 64 South., 863; *Credle v. Baugham*, 152 N. C., 18, 67 S. E., 46, 136 Am. St. Rep., 787; *Conner v. McCoy*, 83 S. C., 168, 65 S. E., 257. And see, also, an earlier case, *Peck v. Lockridge*, 97 Mo., 549, 550, 11 S. W., 246. Other decisions are cited to the effect that attorneys, administrators, executors, and guardians of interested persons are not al-

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lowed to bid and hold the property adversely to the interests represented by them, unless they have interests of their own which they are entitled to protect, and that an officer whose duty it is to conduct the sale cannot become a purchaser thereof, either directly or indirectly. We have no decisions in this State on the subject other than those already mentioned, except the case of *Rogers v. Rogers*, Tenn. Ch. App., 1896, 42 S. W., 70, which is upon the subject of administrators buying at such sale.

We do know that in this State it has been the general, if not the uniform, practice for parties to become purchasers at such sales, and the question has never before been mooted here. We are satisfied that an opinion of this court holding to the contrary would shake hundreds, if not thousands, of titles. Moreover, we see no objection to it. On the contrary, it is often essential, in order that one or more of the owners may protect the property, through making it bring a fair price. As to the trust relation, there can be nothing in this, since all the parties in interest are brought before the court, and are thus called upon to protect their rights. Under such circumstances, it would be out of all reason, as we think, to impose upon either one of the tenants in common the duty of protecting the interests of the others. Their relations, when thus brought into a litigation, are of an adversary nature, and each one must look out for himself. Of course, there must be no fraud in such a sale, nor should there be fraud in any

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other judicial sale; but the obligation is no greater in a sale of this character than in any other.

The remaining assignments of error are disposed of in a memorandum opinion filed with the record, and are all overruled.

Affirm the decree of the chancellor.

Laue v. Grand Fraternity.

LAUE v. GRAND FRATERNITY.

(Jackson. April Term, 1915.)

1. INSURANCE. Mutual benefit insurance. Forfeiture. Residence in prohibited territory. "Residing."

The constitution of a fraternal society by which a member agreed in his application to be bound provided that no benefit certificate should be granted to any one residing outside that part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and that, if a member should remove from such territory, he should forfeit all right to any disability or death benefit. A member who had long resided in Memphis, where his wife and children continuously resided, was in Panama from October to December, 1908, and again from February to June, 1910, returning to his home in Memphis at the expiration of each of such periods. *Held* that, construing the constitution strictly against the insurer, and construing the provisions with regard to residence in, and removal from, the specified territory *in pari materia*, the policy was not forfeited by the member's temporary sojourn in Panama; as the word "residing" referred to the member's domicile, and implied a legal residence, and not a mere transitory existence in the prohibited territory, and the prohibited removal referred, not to a mere removal of the member's person, but to a removal of his residence. (*Post*, p. 243.)

Cases cited and approved: *Stratton v. Brigham*, 34 Tenn., 420; *Kellar v. Baird*, 52 Tenn., 39; *Hascall v. Hafford*, 107 Tenn., 355; *Fickle v. Fickle*, 13 Tenn., 203.

Cases cited and distinguished: *Keelin v. Graves*, 129 Tenn., 103; *Brown v. Beckwith*, 58 W. Va., 140; *Springer v. Lewis*, 22 Pa., 191; *Urquhart v. Smith*, 5 Kan., 447; *Winslow v. Benedict*, 70 Ill., 120.

Constitution cited and construed: Art. 9, sec. 2; Art. 10, sec. 3.

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2. INSURANCE. Construction of contract. Construing against insurer.

Where words are so used in a contract of insurance that their meaning is ambiguous or susceptible of two interpretations differing in import, that interpretation which will sustain the claim of the policy holder and cover the loss should be adopted. (*Post*, p. 247.)

Cases cited and approved: *Life Ins. Co. v. Galbraith*, 115 Tenn., 471-483; *Thompson v. Phenix, etc., Co.*, 136 U. S., 287; *National Bank v. Ins. Co.*, 95 U. S., 673; *McNutt v. Va. Fire Ins. Co.* (Ch. App.), 45 S. W., 61; *Conn. Fire Ins. Co. v. Geary*, 60 Neb., 338.

Cases cited and distinguished: *McCarthy v. Catholic Knights*, 102 Tenn., 345; *Bates v. Detroit Mut. Ben. Ass'n*, 51 Mich., 587; *Jackson v. N. W. M. R. Ass'n*, 78 Wis., 468; *Southern Life Ins. Co. v. Booker*, 56 Tenn., 606; *Ins. Co. v. Morris*, 71 Tenn., 101; *Perkins Oil Co. v. Eberhart*, 107 Tenn., 409.

3. INSURANCE. Mutual benefit insurance. Suspension or expulsion.

The constitution of a fraternal society provided that the fraternity should be composed of a supreme governing council, and a board of directors, etc., and that the governing council should have power to try any member and expel or otherwise punish him. The by-laws made all the death and disability payments expressly subject to an agreement not to remove from the part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and authorized the directors to cancel any benefit certificate for the breach of such covenant. *Held*, that neither the president of the fraternity nor its grand secretary had any authority to suspend a member or discontinue the acceptance of his dues because of his removal from the specified territory, and a letter written a local lodge by the secretary instructing it not to receive his dues did not suspend him. (*Post*, p. 249.)

Cases cited and approved: *Murray v. Supreme Hive, L. O. M.*, 112 Tenn., 665; *Franta, etc., v. Union*, 164 Mo., 304; *Mazurkie-*

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wicz v. Soc., 127 Mich., 145; Pepin v. Société, 24 R. I., 550;
Baxter v. McDonnell, 155 N. Y., 83.

Constitution cited and construed: Art. 1, secs. 2 and 3; Art. 2,
secs. 1 and 2.

4. INSURANCE. Mutual benefit insurance. Suspension or expulsion. Tender of dues.

Where a fraternal society wrongfully declared a benefit certificate forfeited, and refused to accept dues thereunder, the tender of such dues as they became due until the death of the member kept his rights alive. (*Post*, p. 251.)

Cases cited and approved: Day v. Conn. Gen. Life Ins. Co., 45 Conn., 480; True v. Bankers' Life Ass'n, 78 Wis., 287.

5. INSURANCE. Mutual benefit insurance. Amount of recovery. Deducting unpaid dues.

Where a fraternal society wrongfully declared a benefit certificate forfeited and refused to accept dues thereunder, but it was kept alive by the tender of dues, the amount of the dues which the society should have received should be deducted from the amount recoverable under the certificate. (*Post*, p. 252.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
A. B. PITTMAN, Judge.

CARROLL, SCOTT & FISHER, for plaintiff.

A. J. CALHOUN, for defendant.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Laue v. Grand Fraternity.

This suit is on a contract of insurance. It is not disputed that such a contract was made, nor is it denied that it was breached. But the much debated, and very debatable, question is: At whose door must the breach be laid, and who must suffer its consequences? The case is pending on *certiorari*, drawing in question the action of the court of civil appeals by which a judgment recovered by Clara Laue against the Fraternity for \$1,195 and costs of suit was reversed, and her suit dismissed. The terms of the contract are not in dispute. They are established by certain provisions of the constitution and by-laws of the Fraternity, by the statements of an application made to the Fraternity by Herman Laue, husband of the plaintiff, for issuance to him of a benefit certificate payable to the plaintiff, his wife, in the sum of \$1,000, and by the certificate issued by the Fraternity in compliance with the application. The contract so evidenced consists of mutual covenants of warranty. By it the Fraternity was bound to pay Clara Laue \$1,000 upon satisfactory proof of the death of Herman Laue while "this certificate is in full force;" the quotation, of course, meaning while the contract of insurance, evidenced as aforesaid, was in force. And by the contract Herman Laue was bound: (1) To make the payment of beneficial dues on or before the last secular day of the calendar month as required; and (2) not to remove himself from that part of the North American continent lying between the northern boundary of Mexico, or the twenty-fifth parallel of north latitude, and the fifty-fifth parallel

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of north latitude. Laue was also otherwise bound by the contract, but in respect of matters on which no issues are made in this suit, and which therefore need not be stated.

Herman Laue was a native of Germany, and there received his education. He became a resident of Memphis, in this State, in 1883, and there married in 1885. There he purchased a home and other real estate, reared a family, and his wife and sons have continuously resided in the city of Memphis, and now reside at the home purchased by him and owned by them. He was a contractor and carpenter. In 1902 he became a member of a fraternal order known as the United Moderns. By that fraternity, on February, 7, 1902, a benefit certificate was issued to him for \$1,000, payable to his wife, Clara Laue, the plaintiff in the present suit. In November, 1903, that fraternity and the defendant in this suit consolidated, and the consolidated body retained the name of the "Grand Fraternity," which order on November —, 1903, issued to Herman Laue a certificate (called a "rider") by which his membership in the fraternity was admitted, and that fraternity assumed payment of all benefits provided for in the certificate which had been issued to him by the United Moderns.

The Grand Fraternity certificate above referred to was, however, surrendered for cancellation in 1907, when he made his application for the benefit certificate which forms a part of the contract on which the present suit is based. In 1908 he made a visit to Germany to see

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his dying mother. He returned to Memphis, but was unable to get employment. Upon assurance that he could obtain employment from the Isthmian Canal Commission if he would go to Panama, he went there and was employed by the commission from October 10, 1908, to December 18, 1908, as a car repairer, with pay at forty-four cents per hour. He returned to Memphis in January, 1909, where he remained with his family until a short time prior to February 2, 1910, when he again went to Panama and began work for the commission as a carpenter on February 2, 1910, and he continued in such employment until June 15, 1910, at pay of fifty-six cents per hour. On the date last named, he was discharged by the commission on account of physical disability. He again reached his home in Memphis on June 22, 1910. During his last stay at Panama, while at work in the car shops, he was accidentally struck in the left eye with a wooden mallet. His wife, the plaintiff, testified that when he reached home on the 22d of June, 1910, he was in a very nervous condition, and "it seemed as if his mind was wandering," but that physically he was in fine condition. At all events; and beyond dispute, Herman Laue was admitted as a patient to the hospital for the insane at Bolivar, Tennessee, from Shelby county, Tennessee, on July 2, 1910. His mental disease when he entered that institution is shown to have been "acute mania," but at the time of his death his mental disease was "maniac depressive." He was very melancholy at the time of his death. He died on December 14, 1910.

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His age at the time of his admission to that institution was forty-seven years. The cause of his death is said by the physician in charge of the institution to have been "tubercular enteritis," which malady is defined to be inflammation of the intestines.

Of the fact that Herman Laue was dead the defendant Fraternity was notified by a letter from Dr. Jacobson, collector of the Memphis Branch, No. 207, of that Fraternity. The letter was dated January 3, 1911, and on February 22, 1911, the attorney of Clara Laue, by letter of that date, requested the Grand Fraternity to forward to him blank proofs of death, so that he might make out the proper claim of the beneficiary in the certificate involved in this suit. In the same letter the Fraternity was advised that Herman Laue had died some time prior to the date of that letter. To the letter of the attorney the Grand Fraternity replied under date of March 1, 1911, that Herman Laue was not a member of it at the time of his death, and that his certificate was therefore absolutely void. Under date of March 26, 1910, Dr. Jacobson, apparently acting as secretary of the Memphis Branch of the defendant fraternal order, No. 207, forwarded to the Grand Secretary of defendant order at Philadelphia a copy of the minutes of the meeting of the Memphis Branch, No. 207, which had been held on March 9, 1910. Through these minutes the grand secretary was advised that Herman Laue was then in Panama and interested in plantations there. In reply to the foregoing letter the grand secretary of the defendant order

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by letter under date of April 1, 1910, said in part as follows:

“One thing we note in the copy of the minutes which is important at this time and that is with reference to Frater Herman Laue being in Panama. This is outside of the constitutional limits, and you must not accept payments from him if he is living in that country. The constitution fixes the boundary at the northern boundary of Mexico, and any one residing south of that forfeits their certificate. You will find this restriction under article 9, section 2 of the constitution. Kindly be guided thereby in the case of Frater Laue.”

The section of the constitution referred to by the letter of the grand secretary recites, in substance, what was stated in an early part of this opinion as the two covenants made by Herman Laue under the insurance contract in suit as conditions and limitations on all death and liability benefits, and further provides that, if the “frater” or member shall have failed to keep said covenants:

“In each and every case, the frater, for himself and his beneficiary or beneficiaries, shall thereupon forfeit all right to any disability or death benefit from the Fraternity, and his benefit certificate shall be absolutely null and void.”

Upon the foregoing forfeiture clause the first defense of the Grand Fraternity was rested in the trial court, and in the court of civil appeals. A second defense is also urged for it, which is, in substance, that by

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the letter of the grand secretary above quoted Herman Laue was suspended from, and never reinstated to, membership in the Grand Fraternity. By its third defense it is averred that:

“On the 9th day of March, 1910, at a meeting of the lodge in Memphis, plaintiff in open lodge stated that her husband had purchased a large plantation in Panama, and the lodge received a communication from Panama tendering his resignation as recording secretary of the Grand Fraternity at Memphis, stating that he was unable to attend to the office, and that resignation was accepted, and thereupon, the information being conveyed to this defendant pursuant to its charter and by-laws, it declined to accept any dues from the member, and notified him of his suspension, and he thereupon ceased to be a member entitled to any rights as a beneficiary by reason of the aforesaid removal to Panama.”

Passing now to a consideration of the first defense, it is apparent that its validity must depend upon a proper construction of the insurance contract. In his application for the benefit certificate involved in this suit Herman Laue agreed in writing for himself and his beneficiary to comply with, and be bound by, and under and subject to, the charter, constitution, by-laws, rules, and regulations of the Grand Fraternity then in force, and all lawful changes, alterations, or amendments to the same that might thereafter be adopted. Section 2 of article 9 of the constitution of 1908, which

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was in force at the time Laue went to Panama, provides that:

“No benefit certificate shall be granted to any one residing outside of that part of the North American continent lying between the northern boundary of Mexico and the fifty-fifth parallel of north latitude.”

And by section 3 of article 10 it is provided that if a member shall have failed to make payment of beneficial dues, etc., or shall have removed from that part of the North American continent, etc., that in each and every such case, he shall for himself and his beneficiary forfeit all right to any disability or death benefit, etc., “all as hereinbefore more fully set out.”

The provisions of the constitution just above referred to must, of course, be construed *in pari materia*. The meaning of the words “shall have removed,” in section 3, must be read in the light of the meaning of the words “any one residing,” in section 2. Manifestly, it was the purpose of section 2 to require that a benefit certificate should only be granted to a person residing in that part of the North American continent in that section described. The word “residing” implies a legal residence in the territory described, and not a mere transitory existence in that territory. The object of the Fraternity was that each holder of a benefit certificate should have a local habitation and abode in the territory described, to the end that it might be able to receive from him and others of his class permanent current revenue, and, such being the proper construction of section 2, it would seem to follow that the

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removal prohibited by section 3 of article 10 is not a mere removal of the person of the member, but removal of his residence. In other words, we think the contract between the member and the Fraternity was that, whereas he had been admitted to membership in the Fraternity, among other reasons, because of having a fixed abode or residence place in the favored territory, therefore he should not forfeit his membership by a mere removal of his person to the unfavored territory, but should only forfeit his membership by a removal of his fixed place of abode to the unfavored territory.

It is reasonable to hold that the word "residence," as used in section 2, was intended by the parties to have the same meaning as if the word "domicile" had been used in its stead. Speaking on the subject of domicile, it is said:

"We believe, however, that the rule is settled that every one must have a legal domicile somewhere, and that this legal domicile is not changed in law until a new one is acquired. We think the substance of our cases is that, in order to destroy the *status* of a party as the possessor of a domicile once acquired in this State, it must appear that he has removed into another State for the purpose of making it his home, and that his removal for purposes of business, though long continued, will not have the effect of changing his domicile, if he has the purpose of returning to this State upon the completion of the business." *Keeln v.*

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Graves, 129 Tenn. (2 Thompson), 103, 112, 165 S. W., 232, 235.

See, also, *Stratton v. Brigham*, 2 Sneed (34 Tenn.), 420; *Kellar v. Baird*, 5 Heisk. (52 Tenn.), 39; *Hascall v. Hafford*, 107 Tenn. (23 Pick.), 355, 65 S. W., 423, 89 Am. St. Rep., 952; *Fickle v. Fickle*, 5 Yerg. (13 Tenn.), 203.

In *Brown v. Beckwith*, 58 W. Va., 140, 51 S. E., 977, 1 L. R. A. (N. S.), 778, 112 Am. St. Rep., 955, it is said:

“It is a legal maxim that every person must have a domicile somewhere; and he can have but one at a time for the same purpose. From this it follows that one cannot be lost or extinguished until another is acquired. . . . When one domicile is definitely abandoned and a new one selected and entered upon, length of time is not important. One day will be sufficient, provided the animus exists.”

And in a note to the last case above it is said:

“The question when a person who intends to leave a State permanently, but has not yet done so, becomes a nonresident, has arisen mostly, if not wholly, in two classes of cases, those involving the right to exemptions, and those relating to the issuance of attachments. In the first-named class it has been held, in conformity with the rule that, to effect a change of residence, there must be both intention and act, that an intention to remove from the State at a future time will not defeat a claim to an exemption.” *Springer*

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v. *Lewis*, 22 Pa., 191; *Urquhart v. Smith*, 5 Kan., 447; *Winslow v. Benedict*, 70 Ill., 120.

Where words are so used in the contract of insurance that their meaning is ambiguous or susceptible of two interpretations differing in import, that interpretation which will sustain the claim of the policy holder and cover the loss should be adopted. *Life Ins. Co. v. Galbraith*, 115 Tenn. (7 Cates), 471-483, 91 S. W., 204; *Thompson v. Phenix, etc., Co.*, 136 U. S., 287, 10 Sup. Ct., 1019, 34 L. Ed., 408; *National Bank v. Insurance Co.*, 95 U. S., 673, 24 L. Ed., 563; *McNutt v. Va. Fire Ins. Co.* (Ch. App.), 45 S. W., 61; *Conn. Fire Ins. Co. v. Geary*, 60 Neb., 338, 83 N. W., 78, 51 L. R. A., 698.

“It is an elementary principle that forfeitures are not favored in the law, and, in order to work a forfeiture of the rights of membership in a mutual association, it must clearly appear that such was the meaning of the contract, and the facts upon which a forfeiture is claimed must be proved by the most satisfactory evidence.” *McCarthy v. Catholic Knights*, 102 Tenn., 345, 353, 52 S. W., 142, 144, citing 3 Am. & Eng. Enc. L. (2d Ed.), 1086; *Bates v. Detroit Mut. Ben. Ass’n*, 51 Mich., 587, 17 N. W., 67; *Jackson v. N. W. M. R. Ass’n*, 78 Wis., 468, 47 N. W., 733; *Benefit Soc. & Life Ins. (Bacon)*, sec. 198; *Southern Life Ins. Co. v. Booker*, 9 Heisk., 606, 24 Am. Rep., 344; *Insurance Co. v. Morris*, 3 Lea, 101, 31 Am. Rep., 631.

“ ‘It is a cardinal rule of construction that all instruments are to be expounded and to have effect given

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them according to the manifest intention of the parties, as apparent from the whole instrument or agreement, if not incompatible with established principles of law or policy. . . . When a contract is in writing, and its meaning is plain and unambiguous, its interpretation is a matter of law for the court. But, when the writing is not plain and unambiguous, parol evidence is admissible to ascertain the situation and surrounding circumstances, the nature and quality of the subject-matter,' etc. It is also true . . . that, in cases of doubt, the instrument will be construed most strongly against the person who actually drew up the paper, or in whose behalf it was drawn.'" *Perkins Oil Co. v. Eberhart*, 107 Tenn. (23 Pick.), 409, 415, 64 S. W., 760, 762.

It is a clear and undisputable fact on this record that Herman Laue never intended to remove his fixed place of residence or his domicile from the city of Memphis, which was within the favored territory, to Panama, the unfavored territory. His purpose in going into the unfavored territory was to gain temporary employment, and his absence from his fixed place of residence was intended to be temporary only. For the construction urged by the Fraternity it may be said that the location of the domicile or residence of the family of assured during his two sojourns in Panama was of no concern to the insurer, and that its risk of loss was materially increased by the perils of the prohibited territory and the sojourn of Laue therein. But we answer, while the insurer might have stipu-

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lated against such risk, it did not do so in plain terms. It was content to stipulate against a change of his fixed residence or domicile; it was content to assume that he would continue to live where his family lived, and it was too late for it to add by construction a new warranty or covenant to the contract when it found that it had been mistaken in the aforesaid assumption. Laue was entitled to act on the contract as it stood, and to construe it strictly against the insurer, and he did not forfeit his rights by giving that construction to it nor by acting thereon. So we think there is no merit in the first ground of defense.

We think there is no merit in the second defense above set out, for the reason that we have been wholly unable to discover in the constitution or by-laws of the Grand Fraternity any authority whatsoever vesting either the president of the Fraternity or its grand secretary the power to suspend Laue from the benefits conferred upon him by his membership in the order, or to discontinue the acceptance of dues from him. The constitution, in article 1, sets out the purposes of the order. Section 2, article 1, provides:

“The Grand Fraternity shall be composed of a supreme governing and legislative body, known as the governing council; and an executive and administrative body, known as the board of directors; local organizations, known as branches; and such persons as obtain membership according to the constitution and by-laws of the Grand Fraternity. All members, irrespective of sex, shall be known and designated as

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‘fraters,’ and the words ‘he,’ ‘him,’ or ‘his’ wherever used shall be construed to apply to fraters of either sex.”

Article 1, section 3, relates to the corporate seal.

Article 2 and its sections 1 and 2 relate to the duties of the governing council, and in article 2 it is provided, referring to the general council:

“It shall have power to charge, put upon trial, and try any officer or member of the Fraternity, and after trial, by a three-fifths vote of the members present, remove from office, expel from the Fraternity, or otherwise punish as it may adjudge,” etc.

Therefore we hold that the power to expel Herman Laue from the Fraternity was vested by the constitution not in the grand secretary, and not in the president of the order, but in the governing council of the order, and there is no evidence that the governing council of the order ever exercised its power of expulsion against Herman Laue. The remedy of the Fraternity, however, if there had been conduct justifying a forfeiture of his certificate by its member Herman Laue, was not limited to expulsion of him from the order by the council. By section 16 of its by-laws all death and disability payments were declared to be expressly subject to the keeping by the member of sundry covenants therein set out, among which are the payment of dues and the nonremoval of his residence from the favored territory, and by section 7 of the by-laws power was vested in the board of directors to cancel and annul any benefit certificate for any of the causes

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specified in section 16 of the by-laws, but the record fails to show that any such action was ever taken by the board of directors.

The record, therefore, does not present a case of the expulsion of a member under the laws of the order such as was before the court in *Murray v. Supreme Hive L. O. M.*, 112 Tenn. (4 Cates), 665, 80 S. W., 827, where the court said the question was "whether the action of the order . . . was so inequitable and unreasonable that a court of equity will not countenance it, but will restore (the party) to her rights," and that "the rule in such case is that the court will uphold the laws of the organization, and restrict its investigation to the inquiry as to whether such laws have been enforced fairly and without oppression"—citing, among other cases, *Franta, etc., v. Union*, 164 Mo., 304, 63 S. W., 1100, 54 L. R. A., 723, 86 Am. St. Rep., 611; *Mazurkiewicz v. Soc.*, 127 Mich., 145, 86 N. W., 543, 54 L. R. A., 727; *Pepin v. Société*, 24 R. I., 550, 54 Atl., 47, 60 L. R. A., 626; *Baxter v. McDonnell*, 155 N. Y., 83, 49 N. E., 667, 40 L. R. A., 670.

The case at bar, on the contrary, falls within the first of the following principles: If a company wrongfully declares the policy forfeited and refuses to accept the premium when duly tendered, and to give the insured the customary receipt evidencing the continued life of the policy, the assured has a choice of three courses: He may tender the premium and wait until the policy becomes payable by its terms, and then try the question of forfeiture. *Day v. Conn. Gen. Life Ins.*

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Co., 45 Conn., 480, 29 Am. Rep., 693; *True v. Bankers' Life Ass'n*, 78 Wis., 287, 47 N. W., 520. He may sue in equity to have the policy continued in force, or he may elect to consider the policy at an end and bring an action to recover the full value of the policy, in which case the measure of damages is the amount of the premiums paid, with the interest on each from the time it was made. Bacon on Benefit Societies, sec. 376.

So we hold that Laue remained a member of the order notwithstanding the fact that the secretary instructed the collector of the local lodge to refuse acceptance of further premiums from him or his beneficiary. And his rights as a member of the Fraternity were kept alive, as the record shows, by repeated tenders at the due dates of his proper dues, made on his behalf by his wife, plaintiff in the present action.

Neither do we think there is any merit in the third defense set out above. We have quoted it as it appears in one of the pleas interposed by the defendant, but it is not sustained by the evidence in the transcript before us.

It results that the judgment of the court of civil appeals must be reversed, but we hold that the judgment recovered by the plaintiff in the circuit court should be credited by the amount of the proper dues which the Grand Fraternity should have received from Herman Laue prior to his death under the contract of insurance, and by-laws of the order, and to the end that the amount of such credit may be ascertained the cause

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is referred to the clerk of this court; with directions to ascertain the aggregate amount of dues so to be credited upon the judgment, and upon the coming in of his report the judgment will go down in this court for the correct amount, with proper interest. With the foregoing modification, the judgment of the circuit court of Shelby county will be affirmed.

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DREWERY *et al.* v. NELMS.*

(Jackson. April Term, 1915.)

1. ADVERSE POSSESSION. Elements. Presumptions.

The adverse nature of possession must be shown by clear and positive proof, and not by inference; every presumption being in favor of a possession in subordination to the title of the true owner. (*Post*, p. 261.)

2. TENANCY IN COMMON. Hostile character of possession. Presumptions.

In adverse possession, the possession of one tenant in common is the possession of all, and his entry and holding will continue as the possession of all, and to overturn this entirety of possession, there must be some plain demonstration that he has repudiated the rights of his cotenants. (*Post*, p. 261.)

3. TENANCY IN COMMON. Adverse possession. Hostile character.

The ouster and exclusion of cotenants sufficient to establish adverse possession may be effected by taking possession and giving actual notice of a claim of sole ownership, or by other positive and unequivocal acts which must, by their nature, put the other cotenants on notice that they are excluded from possession; mere silent, sole occupation by one of the entire property though claiming the whole estate and appropriating all the rents without notice to his cotenants being insufficient. (*Post*, p. 262.)

4. TENANCY IN COMMON. Adverse possession. Presumption of grant.

A presumption of title may arise by an exclusive and uninterrupted possession by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part, but such presumption arises independent of the statute of limitations, and may be re-

*For cases passing upon the presumption of ouster of one tenant in common from long continued, undisturbed possession of another, see note in 10 L. R. A. (N. S.) 185.

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butted by proof of disability on the part of the cotenants.
(*Post*, p. 262.)

Cases cited and approved: *Marr v. Gilliam*, 41 Tenn., 488; *Hubbard v. Wood*, 33 Tenn., 279; *McClung v. Ross*, 5 Wheat., 116; *McCorry v. King*, 22 Tenn., 267; *Brock v. Burchett*, 32 Tenn., 27.

5. TENANCY IN COMMON. Adverse possession. Evidence.

In ejectment, wherein plaintiffs relied upon the adverse possession of their remote grantor, evidence that such grantor had continued to reside on the land after the death of his mother intestate; that he occupied free of rent except to keep up the improvements and pay the taxes; that he recognized that his holding was only for life, and only occasionally claimed that he owned the entire land—was not such clear and unequivocal proof as was necessary to show a holding to the exclusion of the cotenants to their knowledge. (*Post*, p. 263.)

6. HUSBAND AND WIFE. Adverse possession. Pleading coverture.

In ejectment, plaintiffs relied upon the presumption of a grant by lapse of time to their remote grantor, who had lived upon the premises, which were originally owned by his mother, for more than twenty years after her death. Defendant claimed under a deed from a sister of such grantor, purporting to cover her share as heir of her mother. This sister was married when plaintiff's grantor entered into possession. *Held*, that her coverture could be shown in rebuttal of the presumption of a grant from the cotenants of plaintiff's grantor, although not pleaded in connection with the statute of limitations or otherwise.
(*Post*, p. 263.)

Case cited and approved: *Iron & Coal Co. v. Schwoun*, 124 Tenn., 216.

Code cited and construed: Sec. 4980 (S.).

FROM HARDEMAN.

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Appeal from the Chancery Court of Hardeman County.—J. W. Ross, Chancellor.

J. A. FOSTER, for appellant.

A. J. COATS, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

This suit is in the nature of ejectment filed by C. F. Drewery and N. P. Rich against D. S. Nelms, and is to recover 160 acres of land in Hardeman county and to enjoin a suit brought by defendant in the county court of Hardeman county for sale for partition of the land. The land was originally owned by Margaret Jones by purchase at a public sale in 1855 at the price of \$100. Margaret Jones died in 1880. Prior to her death her son, J. B. Jones, lived on the land by her permission, and continued to reside upon the land for a number of years prior to his death which was in 1906.

The said Margaret Jones died intestate and left five children, namely, J. T. Jones, O. F. Jones, J. B. Jones, Tabitha Blankenship and Bettie Mhoon. Another child, Gus Gay, died without issue. J. B. Jones died intestate, and left W. P. Jones and Veona Jones his children and only heirs. C. F. Drewery purchased the interest of W. P. Jones, which is claimed to be a one-half interest in the land. N. P. Rich purchased the interest of Veona Jones, which is claimed to be a one-half interest in the land. Whether these two

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children of J. B. Jones owned the entire title to the land, or only a one-fifth interest, depends on whether J. B. Jones held this land under such circumstances as barred the title of his brothers and sisters.

There is some slight proof that Margaret Jones placed her son, J. B., in possession of the land, intending to let him have it at her death, but the proof is not at all convincing on this proposition. One witness states that he heard Margaret Jones say that at her death the place was his (J. B. Jones) that the rest of the boys had left her. She lived on the land at that time, and had given J. B. permission to build on the land near her home. Her other children were gone to other States. However, she left the place before her death and died at the home of her daughter, Mrs. Bettie Mhoon, at Corinth, Mississippi. She made no deed to J. B. Jones, and this evidence is too slight within itself to exclude the title of the other heirs.

After the death of his mother, J. B. Jones continued to reside on the land, paid the taxes, which were assessed to him, cut some timber which he never accounted for, and paid no rents to his brothers and sisters, and when he moved off the place, one Monroe Richardson lived on the land by permission of J. B. Jones, but paid no rent except to keep the taxes paid. This holding by J. B. Jones and Richardson was a continuous possession for over twenty years. The land was poor, and part was cleared and part was in timber. As the land would become worn portions would be thrown out as worn-out old fields, and some new

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land was cleared and inclosed by J. B. Jones. The land brought but very little income.

In 1910, defendant Nelms bought the one-fifth interest in the land of Bettie Mhoon and took a deed from her and her husband.

The county court partition proceeding filed by Nelms was against the other heirs of Margaret Jones and purchasers from them and their descendants.

The chancellor sustained the bill, and permitted a recovery of the land, enjoining the county court proceeding. From this decree Nelms appealed.

Complainants' title to more than one-fifth interest depends on whether the possession of J. B. Jones was adverse to his cotenants.

Having no deed or other assurance of title, it is necessary to look to the proof to see whether the other heirs are barred, or whether a grant may be presumed from lapse of time and exclusive claim of right to the entire estate.

T. F. Wright proved the possession by J. B. Jones, and said J. B. claimed the land, but he admits he never heard him say anything about the ownership, and he proves no fact upon which he bases his general statement that J. B. made this claim.

C. F. Drewery, who bought from the son of J. B. Jones, said he supposes J. B. claimed to own it, but he proved no distinct fact on this point.

T. J. Dunn proved that he heard Margaret Jones say the place was J. B. Jones's at her death, as the

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other children had all left her, and that he heard J. B. Jones say his farm was about worn out.

J. Y. Reed, a justice of the peace, proved that he assessed the taxes in the name of J. B. Jones.

Jim Russell said he contracted to buy the land from J. B. Jones about twenty-two years ago, and that J. B. claimed to own the land; that he heard nothing about a child's part. The wife refused to sign the deed, and the trade fell through.

B. P. Drewery, a brother of complainant C. F. Drewery, said he tried to buy the land from J. B. Jones, and that his wife, Harriet, locked herself up in the room and would not sign a deed, but he proved no distinct fact as to claim of ownership by J. B. Jones during his possession of the land.

W. B. Ragan said that J. B. Jones lived on the land and sold some timber, but he never heard him say whose it was.

W. P. Jones, the son of J. B. Jones, testified as to his father cultivating portions of the land and clearing other portions, but he said he never heard his father say whether he had a child's part or all of it. He said that his aunt Bettie Mhoon always claimed she owned an interest in the land, and that he tried to buy her interest.

N. P. Rich said that seventy or eighty acres of the land had been cleared first and last, and that it was mostly worn out, and the inclosures had been turned out and the land was not in cultivation when he bought from the daughter of J. B. Jones. He proved no fact

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to show that there was ever any adverse holding against the other tenants in common by J. B. Jones or his heirs.

Monroe Richardson said that J. B. Jones claimed to own a child's part and admitted that his sister, Bettie Mhoon, owned an interest, and told witness in 1904 or 1905 to buy her share if he wanted to; that witness wrote to Bettie Mhoon and she answered, proposing to sell, claiming an interest, and he filed her letter as evidence. He said he lived on the land by contract with J. B. Jones and paid the taxes in the name of J. B. Jones, but paid no other rents.

J. M. Pruner said he contracted with J. B. Jones to buy this land fifteen or sixteen years ago, but the trade was not consummated because he found J. B. had no deed and only owned one part. He said J. B. claimed to own his own interest and the interest of his brothers, Dock and Tom Jones, making three parts, and told witness that his sisters, Bettie and Tabitha, owned the other two interests.

D. S. Nelms, the defendant, testified that he purchased the interest of Bettie Mhoon, and filed his deed from her and her husband. He said that J. B. Jones told him several times that he only owned a child's part; that the understanding was that he was to stay on the land as long as he lived and kept the place up and paid the taxes. He said that he bought the share of Bettie Mhoon at the suggestion of W. P. Jones, who was to pay him for it in making "ties," but did not do

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so; that W. P. Jones told him his father only had a child's part.

Bettie Mhoon and W. R. Mhoon, her husband, testified that Mrs. Mhoon's mother did not give or sell the place to J. B. Jones; that J. B. lived on the place with the understanding with the other heirs that he was to pay the taxes and keep up the repairs for the use of the land; that this was talked among the heirs about 1877 or 1878; and that letters from time to time had passed between Mrs. Mhoon and her brother, J. B. Jones, recognizing this as the understanding and conceding her interest in the land, and that he never claimed to own more than a child's part.

The doctrine of adverse possession is to be taken strictly, and must be made out by clear and positive proof and not by inference, every presumption being in favor of a possession in subordination to the title of the true owner. The possession of one tenant in common, as a general proposition, is the possession of all. If one tenant in common enters upon the land it will be presumed that he enters for all, and his holding will continue as the possession of all, by construction, each having entire possession of the whole. To overturn this relationship or entirety of possession by all, there must be some plain demonstration that the party in actual possession has repudiated the right of his cotenants. There can be no adverse possession or disseisin by one tenant in common except by some act or conduct on his part which will produce an actual ouster of his cotenants.

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This ouster by one tenant in common against his cotenant may occur, but it takes something more than an appropriation of the rents without an accounting. The mere silent, sole occupation by one of the entire property, though he be claiming the whole estate, and appropriating the whole rents, without an accounting to or claim by the others, without notice to his cotenant that his possession is adverse, and unaccompanied by some act which can amount to an exclusion and ouster of the cotenant, cannot be construed into an adverse possession. This ouster and exclusion may be effected by taking possession and affording actual notice of a claim of sole ownership or other positive and unequivocal act that must by its nature put the other cotenants upon notice that they are excluded from the possession. A presumption of title in such cases may also arise, upon the same ground that a grant from the State is presumed, by an exclusive and uninterrupted possession of the land by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part.

This is an inference of fact which may be deduced from the whole proof on the subject. This presumption arises independent of the statute of limitations. It may be rebutted by the infancy or other disability of the parties, their actual relationship, or other facts showing the possession was not adverse but by the indulgence, permission, or as tenant of the owner. Disabilities may accumulate to rebut the presumption,

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which is unlike the statute of limitations. *Marr v. Giliam*, 1 Cold., 488; *Hubbard v. Wood*, 1 Sneed, 279; *McClung v. Ross*, 5 Wheat., 116, 5 L. Ed., 46; *McCorry v. King*, 3 Hump., 267, 39 Am. Dec., 165; *Brock v. Burchett*, 2 Swan, 27.

The testimony of these witnesses does not make out that clear and unmistakable proof necessary to show a holding by J. B. Jones to the exclusion of his cotenants of such character as will be held to presume that they knew he was claiming adversely to them. The testimony of Mrs. Mhoon and her husband is positive to the effect that J. B. Jones was permitted to use and occupy the land during his life free of rent, except to keep up the improvements and pay the taxes. The positive proof that he recognized this understanding in statements to other witnesses strengthens their testimony. The fact that his own son could not state that he claimed the entire title illustrates the weakness of the contention that his cotenants had notice of an adverse claim. The lapse of time and failure to account for rents are fully explained by positive testimony, and this overcomes any presumption of adverse holding. Take for granted that J. B. Jones did, at the times stated by the few witnesses on that question, offer to sell the property, and held out the idea that it was his own, such occasional claims on his part cannot give notice to the owners that he was repudiating his obligation and understanding with them, unless this was communicated to his cotenants.

And even if his possession was adverse, it cannot

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affect the title of Mrs. Mhoon, a married woman. It was unnecessary to plead her coverture.

The defendant was not setting up a statute of limitations. The complainants were attempting to prove title under the statute. It was a question of presumption by lapse of time which might be rebutted by showing that Mrs. Mhoon was a married woman, and this was a matter of proof arising under averments of title and denial thereof. So far as an issue is concerned as to an adverse possession which operates to transfer title it is unnecessary to plead the statute of limitations. *Iron & Coal Company v. Schwoon*, 124 Tenn., 216, 135 S. W., 785.

Our statute provides that in ejectment the defendant may plead that he is not guilty of withholding the premises claimed by the plaintiff, and upon such plea may avail himself of all legal defenses. Shannon's Code, sec. 4980.

If it is unnecessary to plead the statute of limitations on the effect of the statute to toll the title, arising in an ejectment suit, it follows necessarily that an exception to the statute need not be pleaded.

So, Mrs. Mhoon's title was not taken away from her even if the possession was adverse. The defendant holds under her by conveyance executed since the possession relied on, and if she was not barred, neither was the defendant.

The result is that the chancellor was in error in granting the relief prayed for in the bill, and his decree is reversed and the injunction dissolved and the bill dismissed, at complainants' costs.

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MEMPHIS & ARKANSAS RIVER PACKET CO. v. AGNEW.

(*Jackson*. April Term, 1915.)

1. CORPORATIONS. Powers of foreign corporations. Actions. Accounting.

That a corporation has failed to comply with the law requiring every foreign corporation to file a certified copy of its charter with the secretary of State, and is therefore doing business in violation of law, does not prevent it from requiring its officers and employees to account for secret profits made with the company's money and credit. (*Post*, p. 270.)

Cases cited and approved: Penn. Mutual, etc., Co. v. Bradley, 21 N. Y. Supp., 876; U. S. Express Co. v. Lucas, 36 Ind., 361; Walker v. Kremer, 29 Fed. Cas., No. 17,076; De Laval Separator Co. v. Walworth, 13 Brit. Columbia, 295; Holleman v. Bradley Fertilizer Co., 106 Ga., 156; Moss Mercantile Co. v. First Nat. Bank, 47 Or., 361; Bendet v. Ellis, 120 Tenn., 277; Brooks v. Martin, 2 Wall., 70; Pointer v. Smith, 54 Tenn., 737.

Cases cited and distinguished: Thomas Mfg. Co. v. Knapp, 101 Minn., 432; Benefit Society v. Lesser, 105 Mich., 716; State v. O'Brien, 94 Tenn., 79; Insurance Co. v. Kennedy, 96 Tenn., 711.

2. CORPORATIONS. Ultra vires acts. Accounting.

The captain of a steamboat dealt in cotton seed and other commodities on commission without the knowledge of his employers, who subsequently brought an action for an accounting for secret profits. *Held* that, although the transactions upon which the action was based were *ultra vires* the corporation, they were not *malum in se*, and profits made thereby with the aid of the company's name and the use of its employees were recoverable. (*Post*, p. 272.)

Cases cited and approved: Latta v. Kilbourn, 150 U. S., 524; Aas v. Benham, 2 Ch. D., 244; Kellogg, etc., Co. v. Webster Mfg. Co., 140 Wis., 341; Case v. Kelly, 133 U. S., 21; Scott v. Farmer's,

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etc., Bank, 97 Tex., 31; U. S. Express Co. v. Lucas, 136 Ind., 361; Fisk v. Patton, 7 Utah, 409; Hertzler v. Geigley, 196 Pa., 419; Carson City Sav. Bank v. Carson, etc., Co., 90 Mich., 550.

Cases cited and distinguished: Goodhue, etc., Co. v. Davis, 81 Minn., 210; Mt. Vernon Bank v. Porter, 52 Mo. App., 248; Nordenfelt v. Maxim, etc., Co., A. C., 535.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

McKELLAR & KYSER and GILMER P. SMITH, for appellant.

CARUTHERS EWING, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The bill of complaint was filed by the packet company, a body corporate under the laws of the State of Arkansas, against Agnew, the captain of its steamboat, the Kate Adams, plying between Memphis and Arkansas City, who was also the secretary, superintendent, and director of the company, to recover sums alleged to have been made by defendant during his period of service by way of commissions on purchases of cotton seed at various landings made by that boat, using in the transactions the money and credit of complainant company, and handling and weighing the seed by using the employees of the company.

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It was further alleged that from 1905 to the date of his discharge the defendant had received from the Tennessee Cotton Oil Company fifty cents per ton commission on such cotton seed delivered by the boat to the oil company, all without the knowledge of the packet company; that the accounts of such commissions were carried upon the books of the oil company in the name of the steamer, Kate Adams; and that payments were made to himself by defendant in the name of the steamer.

It was also alleged in the bill of complaint that cotton seed sacks had been purchased by defendant Agnew with complainant company's money, then transported to planters along the banks of the Mississippi river, handled by the boat's employees, and sold at a profit to the customers of the boat, billed out and collected in the name of the complainant; the profits being appropriated by defendant.

Also, that profits had been made in the purchase and sale of cotton seed in like manner.

The defendant answered, proof was taken, and the cause was referred to the master to state an account under a decretal order of the chancellor to the effect that defendant should be charged with all moneys paid out by him to himself not for the benefit of complainant company and in breach of his duty. The master reported: (1) That complainant had received as commission on cotton seed, \$11,308.40; (2) that he had received as profits on the purchases and sales of sacks, \$3,458.05; (3) that he had drawn as profits on the pur-

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chase and sale of cotton seed, \$8,344.43; and (4) that miscellaneous items, properly, chargeable to defendant, amounted to \$506.75. The total so reported to be due to complainant, therefore, was \$23,617.63.

The chancellor adopted this report and decreed the defendant to be liable accordingly. The defendant appealed to this court and has assigned errors.

The proof shows the defendant to have occupied the trust relations to complainant company above indicated, and that he had the confidence of the other officials to the extent that his books were never audited until his infidelity was discovered shortly before his discharge. He had full charge of the company's record and books, and signed all checks on the bank account of the company in disbursement of its funds, including those payable to himself for commissions on cotton seed, etc.

In reference to the commission on seed derived from the oil company, the proof shows that this was paid for the influence and facility the boat had in the accumulation of a supply. The oil company understood itself to be paying the commission to the Kate Adams; it did not concern that company whether Agnew was captain in charge of the boat or another; and, had it been known to that company's officials that Agnew was secretly profiting, the commission deal would not have been made; its existence was not disclosed to the complainant company, though most of the commission sums were paid by the oil company to the account of the boat and then diverted by defendant.

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The allegations of the bill of complaint in respect to the cotton seed bags were sustained by the proof.

Touching the profits on independent or direct purchases and sales of cotton seed, the facts appear to be:

That these were conducted with the funds of and by use of the facilities of the boat.

Beginning with the organization of this company prior to defendant's connection with the company, and for a period of many years, the present steamer Kate Adams, for the purpose of increasing its cargo and correspondingly its revenue and for the purpose of accommodating its patrons, had from time to time, through its officers, captains, and clerks, in a limited way bought cotton seed and other products on the banks of the Mississippi river under a custom that had existed for many years, the profits on which had gone to the complainant company.

Whenever, for example, the boat, in order to get seed, had to make an out of the way landing and one more expensive than a regular landing, something less than the market price was paid for the seed, and this difference was added to the freight rate from that landing, on account of the increased expense of making the landing.

When defendant Agnew began to operate in seed for a secret profit on sales, the funds and credit of the steamer were used; and the actual purchases were conducted for the most part by the clerk of the boat and

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his subordinates, all of whom were the employees of and paid by complainant.

The miscellaneous items are termed by complainant, and properly so on the record, as "petty graft," respecting which no defense is seriously urged.

The defenses relied on in the assignment of errors are:

(1) That the complainant company as an Arkansas corporation had not complied with the law which requires every foreign corporation to file a certified copy of its charter with the secretary of State; and, since it was doing business in violation of law, it could not call defendant to account.

(2) That the matters and things made the basis of complainant's suit were *ultra vires* acts, and hence not to be made the basis of a right, and the court erred in failing to hold, on the issue as to whether defendant was, in the various transactions mentioned, acting for complainant, that defendant was not so acting. When a party may be acting in two capacities, in one of which his conduct would be unlawful and against public policy, or, in the other, when his conduct would be legal and proper, the court should adopt that view of his conduct consistent with law.

Going to a consideration of the first of these defenses: There appear to be cases holding to this view and denying a noncomplying foreign corporation the right to recover on a note of its agent executed for money received under the contract of agency, on the ground that:

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It "would be to make the public policy of the State subsidiary to the propriety and policy of the rule of private law which forbids an agent to question the right of his principal to money collected by him for the principal. Such a rule ignores the broad and controlling rights of the public." *Thomas Mfg. Co. v. Knapp*, 101 Minn., 432, 112 N. W., 989; *Benefit Society v. Lesser*, 105 Mich., 716, 63 N. W., 977.

But in *State v. O'Brien*, 94 Tenn., 79, 28 S. W., 311, 26 L. R. A., 252, this court said:

"Whatever others might say about the right of this foreign corporation to come into this State to carry on its business and acquire property interests without first having complied with the requirements of the act of 1891, at any rate the defendant's mouth is closed when, as agent, he receives the money of and for this corporation, and feloniously appropriates it to his own use. The wrongful act of the principal cannot be invoked as a protection against the still more wrongful act of the guilty agent. To him, under such circumstances, the rule of estoppel applies."

While *State v. O'Brien* was a criminal case, the court in the later civil case of *Insurance Co. v. Kennedy*, 96 Tenn., 711, 716, 36 S. W., 709, correctly, albeit as *dictum*, said in respect of such a defense by an agent of a noncomplying foreign corporation that he would be concluded on the authority of the *O'Brien Case*. And the cases from several jurisdictions deny the defense to an agent in civil cases. *Penn Mutual, etc., Co. v.*

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Bradley, 21 N. Y. Supp., 876,¹ 142 N. Y., 660, 37 N. E., 569; *U. S. Express Co. v. Lucas*, 36 Ind., 361; *Walker v. Kremer*, 29 Fed. Cas., No. 17076; *De Lavol Separator Co. v. Walworth*, 13 Brit. Columbia, 295. And see *Holleman v. Bradley Fertilizer Co.*, 106 Ga., 156, 32 S. E., 83, and note to *Moss Mercantile Co. v. First Nat. Bank*, 47 Or., 361, 82 Pac., 8, 2 L. R. A. (N. S.), 657, 8 Ann. Cas., 572.

This accords with those rulings made in the analogous cases which involve an attempted defense upon the part of the agent that the fund in question was realized as the result of an illegal transaction, and where it is held not to be maintainable, that the money cannot be retained on the ground of the illegality of the original transaction, but that the law will raise an indebtedness in *assumpsit* as against the defendant. *Bendet v. Ellis*, 120 Tenn., 277, 296, 111 S. W., 795, 18 L. R. A. (N. S.), 115, 127 Am. St. Rep., 1,000; *Brooks v. Martin*, 2 Wall., 70, 17 L. Ed., 732; *Pointer v. Smith*, 54 Tenn. (7 Heisk.), 737.

We therefore rule against this contention of the defendant.

It is next urged in behalf of the defendant Agnew, as noted above, that the profits sought to be recovered of him were not produced by him while acting within the scope of his duty; and that the lines of endeavor in which the money was made were lines that were *ultra vires* the complainant corporation. Therefore,

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 66 Hun, 635.

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that the law will not permit that corporation to violate its charter by taking the profits or proceeds of his transactions not originally competent to the company, and which, therefore, arise from undertakings not in conflict with the business of the company.

It should be kept in mind that the profits were realized in transactions conducted by the defendant, not in his own name, but in the name of the company's boat, with the company's money, and aided in most of them by the work of the company's employees. The learned counsel of defendant Agnew cite no cases that deny a recovery under such circumstances, and it would be a reproach to the law if they could. The cases relied on by them are such as define in this connection what is meant by the term "in execution of the agency," and whether or not the act complained of fell within the scope of the official business, such as *Latta v. Kilbourn*, 150 U. S., 524, 14 Sup. Ct., 201, 37 L. Ed., 1169; *Aas v. Benham*, 2 Ch. D. (1891), 244; *Kellogg, etc., Co. v. Webster Mfg. Co.*, 140 Wis., 341, 122 N. W., 737, and we may add *Case v. Kelly*, 133 U. S., 21, 10 Sup. Ct., 216, 33 L. Ed., 513.

The transactions, if conceived of as having been done for or in behalf of the complainant company, were not *malum in se*. If the fact that money withheld by an agent came from the prosecution of an illegal enterprise constitutes no defense, as we have seen, we fail to see how the fact that the funds here sought to be recovered were the product of merely *ultra vires* transactions should do so. The defendant is bound, not by

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reason of the illegality of such course of conduct, but by reason of his agency.

In Thompson on Corporations, sec. 2849, it is said:

“On the clearest principle an officer cannot withhold from a corporation the proceeds of a transaction conducted by him for the corporation on the ground that the transaction was *ultra vires*. Thus, for example, where a bank, without having power to do so, negotiated bonds, it was held that the cashier who performed the work could not retain the profits of the transaction as his own on the theory that the transaction was *ultra vires* the bank. If the transaction was *ultra vires*, it was not *malum in se*, and under the prevailing rule the question could not be raised by the State. So, the president of a corporation was not allowed to set up the doctrine of *ultra vires* as a defense when sued for the unlawful conversion of the stock.”

It has been ruled that land, given the president of a railroad corporation in consideration of the company's extending its line of railway to the property of the grantor, belongs to the company, even though it was without power under its charter to acquire such property. *Scott v. Farmers,' etc., Bank*, 97 Tex., 31, 75 S. W., 7, 104 Am. St. Rep., 835.

In *Goodhue, etc., Co. v. Davis*, 81 Minn., 210, 83 N. W., 531, Davis was sued for profits made while serving as manager, and defended on the ground that the corporation was without power to do the things that he had done in the production of the profits. The court said:

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“It is not necessary to determine whether the corporation had power to purchase grain and sell it for profit. It may be conceded that it had not, yet the agent cannot, while engaged in the service of his employer or principal, act in the capacity of both buyer and seller, without such principal’s consent; and . . . in such cases ‘all profits made in the course of an agency belong to the principal, whether they are the fruits of the performance or of a violation of the agent’s duty.’ ”

In the case of *Mt. Vernon Bank v. Porter*, 52 Mo. App., 248, 65 Mo. App., 448, 148 Mo., 176, 49 S. W., 982, the facts were that the cashier of a bank negotiated a sale of bonds and received \$1,000 therefor and refused to account to the banking company on the ground that what he had done was beyond the scope of his duty as cashier and not within the line of the bank’s business, according to its charter. It was said on the point:

“The contract of the bank (through its officers) to sell the bonds was not *malum in se*, and, if it be conceded that it overstepped its chartered powers in so doing, it was a transgression for which it is answerable to the State alone. . . .

“The transaction was not *malum in se*, and the contract between the bank and the owners of the bonds has been fully executed, and we can discover no reason why the doctrine of *ultra vires* should shield defendant.”

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And see *U. S. Express Co. v. Lucas*, supra; *Fisk v. Patton*, 7 Utah, 409, 27 Pac., 1, and *Hertzler v. Geigley*, 196 Pa., 419, 46 Atl., 366, 79 Am. St. Rep., 724.

The effort of the defendant to escape civil liability by advancing that the public policy touching corporate encroachments and excesses forbids his being called to a reckoning makes pertinent the observation of Lord MacNaghten in *Nordenfelt v. Maxim, etc., Co.*, [1894] A. C., 535:

“There is a homely proverb current in my part of the country which says you may not ‘sell the cow and sup the milk.’ It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act.”

There is more than one phase to sound public policy. One of these that ought to be paramount is that courts should close their ears when dishonest men attempt to wrest and quote rules of law in an effort to shield them from the consequences of their misdeeds.

The plea of *ultra vires* should not, as a general rule, prevail when interposed against a corporation when it would not advance justice but result in injustice. *Carson City Sav. Bank v. Carson, etc., Co.*, 90 Mich., 550, 51 N. W., 641, 30 Am. St. Rep., 454. It cannot avail here.

Affirmed.

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LARKIN *et al.* v. LIGHTBURNE *et al.***(Jackson. April Term, 1915.)****CURTESY. Wife's separate estate. Devise.**

In the Married Woman's Act (Acts 1869-70, ch. 99), section 3 of which provided that married women owning a separate estate should have the power to dispose thereof by deed or will the same as single women, and section 6 of which provided that the act, except section 3, should embrace only such married women as were living apart from their husbands or whose husbands were insane, provided all married women owning any land of any sort or description should have full power to dispose thereof by will as fully as if they were single, but such testamentary disposition should not be construed to defeat any husband's tenancy by curtesy therein, the exception of separate estates from the first part of section 6 does not apply to the latter part of the section, concerning wills, and the husband takes a life estate by curtesy in the separate estate of his wife, the settlement of which did not exclude his curtesy and which was devised to her by others.

Acts cited and construed: Acts 1851-52, ch. 108, sec. 4; Acts 1869-70, ch. 99.

Cases cited and approved: Johnson v. Sharp, 44 Tenn., 45; Molloy v. Clapp, 70 Tenn., 586; Lightfoot v. Bass, 76 Tenn., 350; Vick v. Gower, 92 Tenn., 394; Hughey v. Warner, 124 Tenn., 725; Williford v. Phelan, 120 Tenn., 589.

Case cited and distinguished: Perry v. Gill, 21 Tenn., 218.

Code cited and construed: Sec. 3901 (S.).

FROM SHELBY.

Larkin v. Lightburne.

Appeal from the Chancery Court of Shelby County.
—F. H. HEISKELL, Chancellor.

FITZHUGH & BIGGS, for appellant.

J. W. CANADA, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a suit to settle the estate of Catherine Larkin Lightburne, deceased. Mrs. Lightburne owned certain real estate in Shelby county vested "to her sole and separate use, free from the debts, liabilities, and contracts of her present or any future husband."

In 1893 she was married to J. S. Lightburne, and several children were born to this union and still survive.

By her last will and testament she undertook to devise the aforesaid real estate, held as her separate estate, to her children. Her husband, J. S. Lightburne, has filed a cross-bill in this cause seeking to set up a tenancy by the curtesy in the land referred to devised to the children.

The chancellor dismissed the husband's bill, and his decree was affirmed by the court of civil appeals.

The only question before us is whether a wife may dispose of lands held as her separate estate by will so as to cut off her husband's tenancy by the curtesy.

At an early date this court said, considering a *feme covert's* power to make a will:

"A wife can make a will of property which is hers, not yet reduced into the husband's possession, but this

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with the assent of the husband, not in general but to the particular will; and in such case the assent avails nothing unless he survive it being but his waiver of his right of being her administrator. For the separate property of the wife a power of disposition by will exists independently of the assent of the husband. Where, by agreement before marriage or subsequently, upon a valid consideration, a power of appointment by will is given to the wife, she may, with the assent of the husband, make a will; but even in such case as that it is ruled by Lord Hardwick, in the case of *Henley v. Phillips*, 'that, though a *feme covert* has a power of disposing of a sum of money, or any other thing, by a writing purporting to be a will, yet after the wife's death the proving it in the spiritual court will not give it the authority of a will, but it will still be considered as an instrument only, or an appointment of such sum, or other thing in pursuance of the power, and before it is proved in the Commons as a testamentary conveyance, the husband ought to be examined there as to his consent, nor till then will it have the effect and operation of a will.' 2 Atkins, 48.'" *Perry v. Gill*, 2 Humph., 218.

If the foregoing case the court was dealing with personal property, and the observation as to the wife's power of disposition by will of her separate estate has been understood generally to refer to her personalty. Judge Cooper so understood it, and so limits the headnotes of the case in Cooper's Edition of the Tennessee Reports.

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In *Johnson v. Sharp*, 4 Cold., 45, the court dealt with a devise of real estate, but held it invalid because it was not a separate estate of the testatrix.

By chapter 180 of Acts 1851-52, section 4, carried into the Code at section 2168, and partially carried into Shannon's Code, at section 3901, it was provided:

“Sec. 4. That a married woman may, by will, dispose of any estate secured to her separate use, by deed, or decree or devise or bequest, or in the execution of a special power to that effect, provided the will is in writing, subscribed thereto by herself, or some other person in her presence and by her direction, and the subscription shall be made, or the will acknowledged by her in the presence of at least two witnesses who shall subscribe the will with their names in the presence of the testatrix.”

Whether a devise under this statute would carry the husband's curtesy or be subject to his curtesy we think is debatable. In the *Cyclopedia of Law* it is noted that:

“In some jurisdictions the statutes affecting the property of married women have been construed to the effect that the wife cannot devise her realty so as to bar curtesy, while in some others, the assent of the husband is not required.” 12 Cyc., 1016.

We do not find it necessary to determine the proper construction of the Acts of 1851-52, because chapter 99 of the Acts of 1869-70, covering the subject, being a later statute, must control if there is any inconsistency between the two.

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Chapter 99 of the Acts of 1869-70 is set out in full in the margin.¹ (Reporter will please print the Acts of 1869-70, copy of which is attached, in the margin of the opinion.)

¹ Chapter XCIX, 1869-70.

An act to amend the law in regard to *femes covert* owning fee in real estate, and for other purposes.

Section 1. Be it enacted by the general assembly of the State of Tennessee, that married women over the age of twenty-one years, owning the fee, or other legal or equitable interest or estate in real estate, shall have the same powers of disposition by will, deed, or otherwise, as are possessed by *femes sole*, or unmarried women.

Section 2. Be it further enacted, that the powers of said married women to sell, convey, devise, charge or mortgage their real estate, shall not depend upon the concurrence of the husband, or his consent thereto; provided, her privy examination to any deed, mortgage, or other conveyance, shall take place before a chancellor, or circuit judge of this State, or clerk of the county court.

Section 3. Be it further enacted, that *femes covert*, or married women, owning a separate estate, settled upon them, and for their separate use, shall have and possess the same power of disposition by deed, will or otherwise, as are given by the first and second sections of this act: Provided, the power of disposition is not expressly withheld in the deed or will under which they hold the property.

Section 4. Be it further enacted, that all real property, legal or equitable, of every kind and description owned by a married woman, or held in trust for her sole and separate use, shall be liable for all debts contracted by her for necessities for herself or minor children, as fully as if such married woman were a *feme sole*, and with the same exception as that of a *feme sole*.

Section 5. Be it further enacted, that said married woman shall cause the deed, will or other instruments under which she derives title to her property, claimed under the provisions of this act, to be duly registered in the county of the residence of herself and husband; and on removal to any other county in this State, a copy of the same shall be registered in the county to which said removal takes place; and if the right to the property is not described by deed, will or other instrument, but by succession or inheritance, she shall cause a schedule thereof, verified by her own signature, and acknowledged before the clerk of the county court, or proven, and her privy examination taken, to be registered as aforesaid. If the property shall be land or other real estate, then the registration shall take place in the county where the same is located.

Section 6. Be it further enacted, that the provisions of this act, except the provisions of the third section of this act, shall apply to and embrace only such *femes covert* or married women, as have abandoned their husbands, or who may refuse to live or cohabit with their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind; and also to such married women or *femes covert*, whose husbands may fail or refuse to cohabit with,

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or have abandoned such married women or *femes covert*: Provided, that all married women or *femes covert*, owning any land or real estate of any kind or description, legal or equitable, in this State, by descent, inheritance, deed, gift, or otherwise, shall have full power and authority to dispose of such land or real estate by last will and testament, in as full, ample and complete a manner as if they were *femes sole*, or unmarried women; but such testamentary disposition of said land, or real estate, shall not be so construed as to defeat any husband's tenancy by curtesy in such real estate or land; and that this act take effect from and after its passage.

W. O'N. PERKINS,

Speaker of the House of Representatives.

D. B. Thomas,

Speaker of the Senate.

Passed March 2, 1870.

This act is entitled:

“An act to amend the law in regard to *femes covert* owning a fee in real estate, and for other purposes.”

The substance of the act is as follows:

Section 1 provides that adult married women shall have the same power of disposition of their realty by deed or will as *femes sole*.

Section 2 provides that such power of disposition shall not depend upon the husband's consent, if a privy examination is taken as prescribed.

Section 3 provides that married women owning a separate estate shall have the above power of disposition as to that estate unless such power is expressly withheld in the instrument creating it.

Section 4 provides that a married woman's realty shall be liable for debts contracted for necessities for herself or minor children.

Section 5 requires the registration of their title papers by married women.

Section 6 is in these words:

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“Be it further enacted, that the provisions of this act, except the provisions of the third section of this act, shall apply to and embrace only such *femes covert* or married women, as have abandoned their husbands, or who may refuse to live or cohabit with their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind; and also to such married women or *femes covert*, whose husbands may fail or refuse to cohabit with, or have abandoned such married women or *femes covert*: Provided, that all married women or *femes covert*, owning any land or real estate of any kind or description, legal or equitable, in this State, by descent, inheritance, deed, gift, or otherwise, shall have full power and authority to dispose of such land or real estate by last will and testament, in as full, ample and complete a manner as if they were *femes sole*, or unmarried women; but such testamentary disposition of said land, or real estate, shall not be so construed as to defeat any husband's tenancy by curtesy in such real estate or land; and that this act take effect from and after its passage.”

It will be observed that by the last clause of section 6 it is provided that:

“Such testamentary disposition of said land or real estate shall not be so construed as to defeat any husband's tenancy by the curtesy in such real estate or land.”

A very able argument is made to sustain the proposition that section 3, as to married women owning separate estates, is excepted by the letter and spirit of

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section 6 from the operation of section 6, and it is therefore contended that the final prohibition in section 6 against any testamentary disposition which excludes the husband's curtesy has no reference to the powers of disposition conferred in section 3 upon married women owning separate estates, and does not limit such powers.

We cannot take this view. Section 6 does except section 3, but it is excepted with a proviso. The proviso qualifies the whole of section 6. The exception is restrained by the proviso, just as are the enacting words.

Paraphrased with sufficient accuracy for the purposes of the argument, section 6 may be read:

Be it further enacted, that the provisions of the act, except as to married women owning separate estates, shall only apply to married women living apart from their husbands, and married women having husbands *non compos mentis*: Provided "all married women or *femes covert* owning any land or real estate, of any kind or description, legal or equitable," may dispose of same by will as if unmarried, but such testamentary disposition shall not defeat "any husband's" curtesy.

The legislative thought thus seems plain. While no married women, except those owning separate estates, and those having imbecile husbands, or those living apart from their husbands, can sell, convey, and mortgage their real estate according to the terms of sections 1 and 2, all married women owning lands or estates real of any kind or description, legal or equitable (this includes separate estates and every other kind),

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can dispose of them by will, but no such disposition of said interests (whether separate estates or not) shall defeat any husband's curtesy.

The power to devise is conferred on all married women as to all estates real. All are likewise restricted so they may not by will deprive any husband of his estate by the curtesy.

Moreover, this is right and just. It is beyond the husband's power by will to deprive his wife of dower. No more should she be allowed by will to defeat his curtesy.

Molloy v. Clapp, 2 Lea, 586; *Lightfoot v. Bass*, 8 Lea, 350; *Vick v. Gower*, 92 Tenn., 394, 21 S. W., 677, and other cases called to our attention by counsel, dealt with the wife's power under the act of 1869-70 to sell, mortgage, or convey her separate estate in realty.

Hughey v. Warner, 124 Tenn., 725, 140 S. W., 1058, 37 L. R. A. (N. S.), 582, and *Williford v. Phelan*, 120 Tenn., 589, 113 S. W., 365, discussed wills of personalty.

Nothing we have said conflicts with these cases. Singularly enough, the question here presented seems not to have arisen in this court.

We conclude that Mrs. Lightburne was without power to devise her real estate so as to defeat her husband's curtesy. There was no intention whatever to exclude his curtesy, indicated in the settlement of this separate estate upon her. We are not dealing with such a case. So far as the record before us discloses, the devises to the children are good, and will be upheld, but they are subject to the life estate of Mr. Lightburne.

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The decree of the court of civil appeals and of the chancellor will be reversed, and the cause remanded to the chancery court of Shelby county for further proceedings. Tax costs to the estate.

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ESSENKAY CO. v. ESSENKAY SALES CO. *et al.* (No. 30.)

(Jackson. April Term, 1915.)

1. EQUITY. Cross-bill. Service. Persons on whom service may be made.

Where, in a suit, by a nonresident, defendant files a cross-bill presenting matters not available in an answer, service of process thereon may be had on complainant's solicitor of record. (*Post*, pp. 288-292.)

Cases cited and approved: *Henderson v. Campbell*, 13 W. R., 704; *Hitner v. Suckley*, 2 Wash. C. C., 465; *Dunn v. Clarke*, 8 Pet., 1; *Schenck v. Peay*, 1 Woolworth, 175; *Segee v. Thomas*, Fed Cas., No. 12,633; *Lowenstein v. Glidewell*, Fed. Cas., No. 8575; *Crellin v. Ely* (C. C.), 13 Fed., 420; *Pacific R. v. Mo. Pac. Ry. Co.* (C. C.), 3 Fed., 772; *Gregory v. Pike*, 79 Fed., 520; *Am. Graphophone Co. v. Smith*, 1 App. D. C., 563; *Eckert v. Bauert*, 4 Wash. C. C., 370; *Abraham v. North German Ins. Co.* (C. C.), 37 Fed., 731; *Love v. Hall*, 11 Tenn., 408.

Cases cited and distinguished: *Hope v. Hope*, 4 De G., M. & G., 328; *Ward v. Seabring*, 4 Wash. C. C., 472.

2. EQUITY. Cross-bill. Application for service. Grounds.

A defendant, filing a cross-bill against a nonresident complainant, is entitled to an order for service of process on complainant's solicitor of record, though in making application defendant erroneously relies on Acts 1887, ch. 226, inapplicable to the case. (*Post*, p. 292.)

Acts cited and construed: Acts 1887, ch. 226.

Cases cited and approved: *Life Ins. Co. v. Spratley*, 99 Tenn., 322; *Guthrie v. Indemnity Association*, 101 Tenn., 643; *Thach v. Continental Travelers' Mutual Accident Association*, 114 Tenn., 271.

3. EQUITY. Pleading. Issues. Service of process.

The court refusing to make an order for service of process on nonresident complainant on defendant filing a cross-bill, may not

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proceed to dispose of the matters involved in the cross-bill setting forth matters which could not properly appear in an answer. (*Post*, pp. 292, 293.)

Case cited and approved: *Moore v. Tillman*, 106 Tenn., 361.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Chancellor.

McKELLAR & KYSER, for appellant.

ANDERSON & CRABTREE, for appellees.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed to collect a note of \$8,000 made by the defendants to the complainant. An answer and cross-bill were filed. The cross-bill presented certain matters of equity which could not properly appear in an answer. The complainants were non-residents, and therefore personal service could not be had on them. The defendants asked that service be made upon the solicitors of record for the complainants. The chancellor refused to make this order. This was error. The practice is laid down in 1 Daniell's Chan. Prac., marginal page 447 (Cooper's Ed.). It is there said:

“The principle upon which the court acts in directing substituted service is clearly enunciated by Lord Cranworth, C., in the case of *Hope v. Hope*, 4 De G., M. & G., 328, in which case he says that, ‘where there is an

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agent in this country managing all the affairs of a defendant who is abroad, and regularly communicating with him upon his affairs, or where he has an agent here specially managing the particular matter involved in the suit, the court has felt that it might safely allow service upon the agent to be deemed good service upon the person abroad, because the inference was irresistible that service so made was service on a person either impliedly authorized to accept that particular service, or who certainly would communicate the process so served to the party who was not in this country to receive it himself. The object of all service was, of course, only to give notice to the party on whom it was made, so that he might be made aware of, and able to resist, that which was sought against him, and when that had been substantially done, so that the court might feel perfectly confident that service had reached him, everything had been done that was required.' "

In a note to the last sentence it is said that where a bill was filed against a firm, one member of which was resident abroad, substituted service on the members in England was directed—citing *Henderson v. Campbell*, 13 W. R., 704, L. J. J.

It is further stated in the text, however, that substituted service of a copy of the cross-bill upon the solicitor who filed the original bill will not be ordered, but that the court will in such a case stay the proceedings in the original cause until the defendants have entered an appearance. But in a note it is shown that the American rule is different, that substituted service

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is permitted in the United States courts in cross-causes, and injunction bills to stay proceedings at law in the same court—citing *Hitner v. Suckley*, 2 Wash. C. C., 465, Fed. Cas., No. 6543; *Ward v. Seabring*, 4 Wash. C. C., 472, Fed. Cas., No. 17160; *Dunn v. Clarke*, 8 Pet., 1, 8 L. Ed., 845; *Schenck v. Peay*, 1 Woolworth, 175, Fed. Cas., No. 12450.

In *Ward v. Seabring*, supra, it is said:

“In cases of injunctions to stay proceedings at law, and cross-suits in equity, and in no others, will the court direct service of the subpoena to be made on the attorneys at law, or upon the adverse solicitor in the cross-suit. . . . The practice of the court directing service of the subpoena on the attorney of the plaintiff at law in cases of injunctions, and on the solicitors of the plaintiff in the original suit, where a cross-bill is filed, is founded on the necessity of the case; the plaintiff in the action at law and in the original suit in equity in most cases residing out of the district in which the court sits, and there being no remedy for the party unless it is afforded by entertaining those suits and countenancing a service of the subpoena on the law agent of the nonresident party.”

The other cases cited are in full accord. To these we may add *Segee v. Thomas*, Fed. Cas., No. 12633, 3 Blatchf., 11; *Lowenstein v. Glidewell*, Fed. Cas., No. 8575, 5 Dill., 325; *Crellin v. Ely* (C. C.), 13 Fed., 420; *Pacific R. v. Missouri Pacific Ry. Co.* (C. C.), 3 Fed., 772; *Gregory v. Pike*, 79 Fed., 520, 25 C. C. A., 48; *American Graphophone Co. v. Smith*, 1 App. D. C., 563;

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Eckert v. Bauert, 4 Wash. C. C., 370, Fed. Cas., No. 4266; *Abraham v. North German Ins. Co.* (C. C.), 37 Fed., 731, 3 L. R. A., 188.

An order of the court must be made allowing the substituted service, as a preliminary thereto, and such order or a copy thereof must be served with the process, and copy of the bill, and it must be stated in the order that it is to be so served. 1 Dan. Ch. Pr., marg. p. 449. The application for the order may be an *ex parte* motion, supported, when necessary, by affidavit showing the efforts that have been made to effect service. That all practicable means have been exhausted, and showing how the substitute service is to be effected. *Id.* But, of course, where the parties to be served, the complainants in the original bill, are nonresidents, and represented by resident counsel, this need only be shown. And as to the necessity of an order by the court, see, further, *Gregory v. Pike*, *supra*; *Pacific R. v. Missouri Pac. Ry. Co.*, *supra*.

As to the statement in the text of Daniell, *supra*, based on certain English authorities, to the effect that in the case of a cross-bill substituted service will not be ordered, but that the cause will be stayed until the complainant in the original bill enters his appearance to the cross-bill, we think the American practice is more direct, more speedy, and in every way better. It is perfectly apparent that no more effective means, aside from actual personal service, can be devised conveying information to the nonresident party than by serving the process on his attorney in that very case. The

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court may be reasonably sure that the attorney will promptly give full information of the fact to his client, and in addition will counsel him as to his rights and duties under the circumstances. See our own case of *Love v. Hall*, 3 Yerg. (11 Tenn.), 408, which has a general bearing on the subject.

It is not material that the counsel in the present case, in making application for the order, relied on chapter 226, Acts of 1887. It was sufficient that the motion was properly made. It lay within the power of the chancellor to grant it, although the counsel cited inapplicable law in its support.

The cases of *Life Insurance Co. v. Spratley*, 99 Tenn., 322, 42 S. W., 145; *Guthrie v. Indemnity Association*, 101 Tenn., 643, 49 S. W., 829, and *Thach v. Continental Travelers' Mutual Accident Association*, 114 Tenn., 271, 87 S. W., 255, have no bearing on the question. These cases all involve applications of chapter 226, Acts of 1887.

It seems that the chancellor, after refusing to make the order for service, proceeded to dispose of the matters involved in the cross-bill as if these matters could be properly included in an answer, and held, after the evidence was introduced, that these matters were not proven. It is now insisted by counsel for complainant that we should do likewise, and that, if we find the chancellor's conclusion on the facts was correct, we shall be able to see that no injury was done the defendants. But suppose we reach a different conclusion on the facts, and shall be of the opinion that defendant is entitled to

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a judgment against the complainant; we shall then be unable to render judgment for want of proper pleadings, and shall have to remand the cause for issue and trial, and shall have thus used the time of the court to no purpose. Even if the parties themselves had thus agreed, by conduct, to waive the necessity of a cross-bill, the result would be the same. *Moore v. Tillman*, 106 Tenn., 361, 365, 366, 61 S. W., 61.

The decree of the chancellor must be reversed, to the end that the order for service may be granted, and that the cross-bill may be served, and that it may be put at issue, and that the whole case may be heard at one time.

Complainants will pay the costs of the appeal.

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PERKINS v. BROWN. (No. 83.)*

(Jackson. April Term, 1915.)

1. DAMAGES. Property. Measure.

The owner of a vehicle held for use may recover for his loss of use by reason of a tortious injury while being repaired, in addition to the cost of repairs. (*Post. pp.* 296, 297.)

Cases cited and approved: *Brown v. Southbury*, 53 Conn., 212; *Johnson v. Holyoke*, 105 Mass., 80; *Mizner v. Frazier*, 40 Mich., 592; *The Atlas*, 93 U. S., 302.

2. DAMAGES. Property. Compensation.

Compensation for injury being the rule, the owner of an automobile used for pleasure may recover substantial damages for loss of use while it is being repaired after a tortious injury by defendant. (*Post. p.* 297.)

Cases cited and approved: *Cook v. Packard Motor Car Co.*, 88 Conn., 590; *Murphy v. New York City Ry.*, 58 Misc. Rep., 237; *Universal Taximeter Cab Co. v. Blumenthal*; 143 N. Y. Supp., 1056.

3. DAMAGES. Injuries to property. Measure.

That the owner of a pleasure motor car did not hire another car while it was being repaired after a tortious injury by defendant does not prevent him from recovering damages for loss of use thereof. (*Post, pp.* 297, 298.)

4. DAMAGES. Property. Measure.

The owner of a motor car, held for pleasure driving and used only a small portion of each day, cannot, where the car was injured through the fault of defendant, recover as damages for the loss of the use of the machine the full daily rental value of machines in that vicinity. (*Post, pp.* 298, 299.)

5. DAMAGES. Property. Loss of use.

Where a motor car was injured through defendant's fault, the owner cannot, as damages for loss of use, recover the rental

*For cases passing upon the measure of damages for damage to automobile used for pleasure, see note in L. R. A., 1915, C., 319.

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from week to week for a car, but should recover only the aggregate rental of a machine for a similar time. (*Post*, pp. 298, 299.)

Case cited and approved: Trout Auto., etc., Co. v. People's, etc., Co., 168 Ill. App., 56.

6. APPEAL AND ERROR. Remand. Discretion of court.

A reviewing court may, in its discretion, qualify the order of remand so as to restrict the scope of the new trial ordered. (*Post*, pp. 299-302.)

7. APPEAL AND ERROR. Remand. Order of remand.

Where the only question at issue was the measure of damages, the appellate court, on reversal of a judgment for plaintiff, will qualify the order of remand so as to determine only the matter of damages. (*Post*, pp. 299-302.)

Cases cited and approved: Baxter v. Nurse, 6 M. & G., 935; Stroud v. Stroud, 7 M. & G., 417; Smith v. Whittlesey, 79 Conn., 189; Simmons v. Fish, 210 Mass., 563; Winn v. Columbian Ins. Co., 12 Pick. (Mass.), 279.

Cases cited and distinguished: Rex v. Mawbey, 6 T. R., 619; Bernasconi v. Farebrother, 3 B. & Ad., 372; Hutchinson v. Piper, 4 Taunt., 555.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—J. P. YOUNG, Judge.

W. P. BIGGS, for appellant.

WILSON & ARMSTRONG, for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

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Brown's automobile was injured in a collision with the automobile of Perkins, due to the negligent operation of the latter machine by the chauffeur; and the only questions raised for determination by the petition for *certiorari* and the accompanying assignments of error are as to the right to damages and as to the true measure of damages for the consequent detention of the injured automobile in shop for repairs.

The car of Brown was one used for pleasure, and not in trade or for profit. During the period of detention for repairs Brown paid nothing for the hire of a substitute automobile, and he and his family forewent their customary pleasure rides.

The trial judge instructed the jury that Brown as plaintiff below, was entitled to recover the rental value of an automobile similar to the one injured during the period of detention and loss of use; and allowed testimony to be introduced, over defendant's objection to the effect that such a machine was to be hired at from \$90 to \$100 per week.

The first insistence of petitioner for error is that nothing for the loss of use can be allowed, since the car injured was one that was used for recreation or luxury and not profit, and its owner, in point of fact, had made no expenditure for the use of another car.

The authorities are quite harmonious to the effect that the owner of a vehicle held for use may recover for the loss of its use, by reason of tortious injury, while being repaired, in addition to the cost of the necessary repairs. *Brown v. Southbury*, 53 Conn., 212, 1 Atl.,

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819; *Johnson v. Holyoke*, 105 Mass., 80; *Mizner v. Frazier*, 40 Mich., 592, 29 Am. Rep., 562; *The Atlas*, 93 U. S., 302, 23 L. Ed., 863; Sedgwick, *Damages* (9th Ed.), sec. 195.

Nor may it be held, under the authorities, that the right to recover substantial damages, as distinguished from nominal damages, depends upon the precedent use of the car for profit. Compensation for injury being the rule, there can be no just reason for the allowance of the usable value in the one case and its disallowance in the other. As pointed out by Mr. Sedgwick (section 243a), the value of the use of personal property is not the mere value of its intended use, but of its present potential use, whether availed of or not by its owner. His right of user, whether for business or pleasure, is absolute, and whoever injures him in the exercise of that right cannot complain when held to respond on that basis. *Cook v. Packard Motor Car Co.*, 88 Conn., 590, 92 Atl., 413, 418; *Murphy v. New York City Ry.*, 58 Misc. Rep., 237, 108 N. Y. Supp., 1021; *Universal Taximeter Cab Co. v. Blumenthal*, 143 N. Y. Supp., 1056; Sedgwick, *Damages*, sec. 243b.

It is next urged that a disallowance of the usable value of the car must result, because the plaintiff did not actually expend money in hiring a substitute car for recreation purposes. This insistence also is not tenable. *Cook v. Packard Motor Car Co.*, supra. Two recent decisions of the House of Lords of England have ruled the point. In *The Greta Holme* (1897), A. C., 597, a recovery was allowed for the loss of the use

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of a dredger, injured in a collision, although the owner was out of pocket no definite sum for a substitute during the period necessary for repairs; and in *The Mediana* (1900), A. C., 112, where there was a lightship substituted for the lightship damaged, and it was argued that, as nothing was paid for the hire of the substitute, no damages were consequent or allowable. Lord Chancellor Halsbury gave his opinion, and the judgment was, in opposition to that argument.

A third contention of petitioner is that the usable value of an automobile is not its rental value, as charged by the trial judge; and that it was error for the trial judge to permit the introduction of the above recited testimony as to the market rental value per week of a similar car at garages in the city of Memphis.

Whether the two terms "rental value" and "usable value" may be treated as equivalent terms when applied to personal property so detained is a matter on which the authorities seem to differ. The Connecticut court in *Cook v. Packard Motor Car Co.*, supra, holds to the view that they are not equivalent terms, and that such a plaintiff "cannot recover the rental value of his car during the period of detention, for such rental value includes a substantial allowance for depreciation and repairs, to which the plaintiff's car has not, in the meantime, been subjected." On the other hand the intermediate appellate courts of New York and Illinois hold that the rental value of a car during the period of loss of its use is a proper measure of dam-

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ages in behalf of the plaintiff. *Universal Taximeter Co. v. Blumenthal*, supra; *Trout Auto., etc., Co. v. People's, etc., Co.*, 168 Ill. App., 56, 60.

It is not necessary for us to determine the point on this record, since we are of opinion that if the market rental value be a proper measure of damages in such case, then rental value was fixed on the trial on a basis that was erroneous for two reasons. It is manifestly unjust to the defendant to have either rental or usable value fixed in behalf of the plaintiff on the basis of a full daylight rental charge for an automobile, as was permitted in this case, when the proof shows that the plaintiff and his family customarily used the car only during a few hours of a day for pleasure and shopping drives.

Further, while it generally held, and was conceded in the *Cook Case*, supra, that proof of rental value is competent as furnishing some evidence of usable value, we yet think it clear that the proof, in order to competency, should be of the market charge for the entire period of the necessary loss of use. It is obvious that the rental charge per week aggregated for twelve weeks would amount to more than the sum representing the rental charge for the longer or entire detention period.

We are not satisfied that a result just to the defendant has been reached under the proof admitted and the instructions given the jury by the trial judge.

The judgment of the court of civil appeals must, therefore, be reversed and the cause remanded for a new trial.

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As to the nature of the order to be made on the remand: In view of the fact that no error was assigned in the appellate courts to have been committed in the court of trial in respect to the question of the liability of appellant for negligence in causing the collision, and that the errors claimed upon appeal and apparent from the record are such only as affect the proper measure of the consequent damages, the appellee plaintiff moves this court to limit the retrial in the court below to the single question of the ascertainment of proper damages.

The motion raises a question that appears never to have been raised or decided in this jurisdiction—the power of a reviewing court to so qualify the order of remand as to restrict the scope of a new trial by it ordered.

At an early day some difficulty was found and expressed by the English courts on the point, resulting in refusal on their part to confine a new trial to part of the issues in a case because of the supposed indivisibility of a verdict. But latterly in England it has been held that this power inheres in courts of review as a part of their common-law powers. In *Rex v. Mawbey*, 6 T. R., 619, 638 (1776), Lord Chief Justice Kenyon said on the point:

“I think the rule was correctly stated by the counsel for the defendants, that in granting new trials, the court know no limitations (except in some excepted cases), but they will either grant or refuse a new trial, as it will tend to advance justice. . . . I have stu-

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diously gone out of the way in order to express my opinion on this point, an opinion formed on great deliberation.”

In the case of *Bernasconi v. Farebrother*, 3 B. & Ad., 372, 23 E. C. L., 100 (1832), Lord Tenterden, for the court, said:

“We have considered also whether we could limit the inquiry upon the new trial to one point. In *Hutchinson v. Piper*, 4 Taunt., 555, Gibbs, J., lays it down that, in certain cases of which he gives instances, a new trial may be restrained to one point.”

The practice is now firmly fixed in that jurisdiction. *Baxter v. Nurse*, 6 M. & G., 935, 46 E. C. L., 935; *Stroud v. Stroud*, 7 M. & G., 417, 49 E. C. L., 417.

The same practice prevails in a large number of the American jurisdictions, as may be seen by a reference to the annotation of the case of *Smith v. Wittlesey*, 79 Conn., 189, 63 Atl., 1085, 7 Ann. Cas., at page 116; and see *Simmons v. Fish*, 210 Mass., 563, 97 N. E., 102, Ann. Cas., 1912D, 588.

A statement of the rule in succinct terms is to be found in 2 R. C. L., 287, sec. 241:

“Probably from a desire to eliminate unnecessary litigation, and in the exercise of the discretion with which the appellate court is invested with respect to the granting of new trials, it is undoubtedly the present general rule, in remanding a cause for a new trial, either by a court or a jury, when error exists as to only one or more issues, and the judgment in other respects is free from error, to limit the new trial to the issues affected by the error. This rule permitting

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the appellate court to limit the issues has been held applicable in actions sounding in damages when the error affects only the assessment of damages, and the new trial has been limited to that question alone.”

An early American case was that of *Winn v. Columbian Ins. Co.*, 12 Pick. (Mass.), 279, where Chief Justice Shaw reasons that there are many cases so situated that it would be highly proper to grant a new trial as to a particular point, or for the purpose of correcting a particular error or mistake, and that this is analogous to the case of judgments, awards, and other legal proceedings, good in part and bad in part, when the court will, if the position of the case will admit of it, preserve that which is good and correct that which is erroneous.

In our opinion, the practice thus so abundantly sustained by the authorities should also, from the standpoint of policy, be adopted in this State. If it is to the interest of the State that there be an end to litigation, the courts should not be slow to adopt this rule that looks to the preventing of further contest on phases of litigation or issues already well settled, the saving to litigants the costs incident to the relitigation of such matters, and to the courts the time unnecessarily consumed therein.

As has been noted above, the power is one to be exercised by the court of review in its sound discretion. Coming now to determine whether the discretion is one that should be exercised in the instant case, we hold it to be manifest that it should. The order of remand will, therefore, be qualified accordingly.

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STATE, to use of HEISKELL, v. FIDELITY & DEPOSIT Co. OF
MARYLAND *et al.* (No. 41.)*

(*Jackson*. April Term, 1915.)

1. EQUITY. Powers of special commissioner. Loan of money.
Compliance with order.

Where the court ordered that a special commissioner should "for the present lend out all of the funds now in his hands in this cause," such commissioner had no authority to loan moneys collected subsequently to the orders. (*Post*, p. 311.)

2. EQUITY. Special commissioner. Unauthorized loan. Adjudication of validity. Confirmation of report.

Where a special commissioner made two unauthorized loans, and thereafter made a full report of the transactions of his office to the court, listing the notes which he had taken for such loans, and turning them in, whereupon his report was confirmed, his successor appointed, and himself discharged as commissioner, no objection being raised that the loans were unauthorized until the State sued to enforce the commissioner's and his sureties' liability on two official bonds for his breach of duty, the confirmation of the commissioner's report by the court was not an adjudication that he was authorized to lend the money, since there can be no adjudication without an issue. (*Post*, p. 312.)

3. EQUITY. Special commissioners. Unauthorized loan. Confirmation by court. Waiver of irregularity.

Under such facts a waiver of the irregularity of the commissioner's action in lending could not be charged against the court, as a waiver cannot result from mere inaction. (*Post*, p. 312.)

*This cause was advanced for hearing in the Supreme Court and was determined at the April term, 1915, at Jackson, Tennessee, on the 3rd day of June, 1915, and the opinion filed with the clerk of the Supreme Court at Knoxville, Tennessee, on June 5, 1915.

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4. EQUITY. Special commissioners. Unauthorized loan. Condonation of irregularity.

Such circumstances did not amount to a condonation of the commissioner's wrongful act in making the loans. (*Post*, p. 312.)

5. EQUITY. Special commissioners. Unauthorized loans of funds of wards. Consent of guardian.

Where the guardian of minors, owners of the fund which a special commissioner lent without authority of the court, consented to the loans, such unauthorized action of the commissioner was not validated by the consent to free him and his surety from liability on his bond, since the fund was not under the guardian's control, but under that of the court, whose authorization of the loans was essential to their validity. (*Post*, p. 313.)

6. EQUITY. Special commissioners. Loans. Compliance with order.

Where the court, in authorizing a special commissioner to loan funds in his custody, decreed that he should take for the note of the borrower with two good and solvent sureties thereon, or good collaterals, such sureties or collaterals to be approved by the court, and the commissioner took but one surety, whose name was not submitted to the court, and who was not approved, and took no collaterals, there was a breach of duty on the part of the commissioner subjecting him and his surety to liability on his bond. (*Post*, p. 313.)

7. EQUITY. Special commissioners. Loan. Order of court. Duty of compliance.

Where, previous to loaning funds in his custody by authority of the court, a special commissioner did not read the order directing the loan, and that the securities be reported, but supposed that it was in the usual form, permitting him to approve the securities for the loans, his lack of knowledge of the contents of the order could not excuse his failure to comply therewith, nor was the failure of the solicitor for the complainants to mention to him the special direction of the order, when notifying him of it, any excuse, since it was the duty

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of the commissioner to read the order to ascertain his authority.
(*Post*, p. 313.)

8. EQUITY. Special commissioners. Loan. Noncompliance with order. Sureties.

Where a special commissioner, in lending funds, failed to comply with the order to take two good sureties, and took but one, the fact that the principal and the one surety continued solvent until some months after the commissioner's settlement did not free him and his surety from liability on his bond on the ground that no harm had been done by his disobedience of the order; since, had he taken two sureties, the notes might have been collectible after the insolvency of the principal and the surety actually taken because of the solvency of the second surety. (*Post*, p. 314.)

9. EQUITY. Special commissioners. Liability for improper loan. Excuses.

Where a special commissioner, in loaning funds by order of the court, failed to comply therewith as to the number of sureties he should take, his honesty and sincerity could not excuse his dereliction, since, if he knew the terms of the order, and had doubt as to its meaning, he should have applied to the court for instructions, while, if he failed to examine the order, and had no knowledge of its terms, he had to bear the consequences of his negligence. (*Post*, p. 315.)

10. EQUITY. Special commissioners. Surety. Liability.

Where a special commissioner's bond was conditioned that he should well and faithfully discharge his duties as commissioner, and he made full report of his commissionership, listing notes which he had taken when lending funds in his custody, either wholly without authority or on terms not authorized by the court, which report was confirmed, such settlement of the commissioner was not a performance of every duty which the surety on his bond had obligated himself to secure, since a loan of money by the commissioner without authority was a failure to discharge the duty incumbent upon him to hold the funds until otherwise ordered by the court, while, if the loan

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was on terms other than those ordered, he likewise failed to discharge his duties. (*Post*, p. 316.)

11. EQUITY. Special commissioners. Liability on bond. Identity with that of clerk and master. Statutes.

Shannon's Code, sec. 402, provides that every clerk of court shall enter into bond for \$10,000 for the faithful discharge of his duties. Section 403 directs that a bond shall be executed for \$5000 conditioned to account for all sums arising from taxes on suits, etc. Section 404 provides that the courts may also require their clerks to give bond to cover property which may come to their hands as special commissioners. Section 405 provides that the failure of the clerk to execute the special bond provided for by section 404 shall not subject him to any penalty, but the court may confide the particular business to others who will give the required security, and, in the absence of such special bond, the clerk and his sureties will be liable on the clerk's regular official bond for all property with which such clerk may be chargeable as special commissioner. A commissioner, who was also clerk and master, made his settlement as clerk, and he and his sureties were thereafter discharged from liability on his bond as clerk and master. Thereafter, acting as commissioner, he made an unauthorized loan of funds in his hands, and in the State's suit to enforce his bond the surety contended that the office of special commissioner was an integral part of that of clerk and master, and that when such commissioner ceased to be clerk he likewise ceased to be commissioner, so that the surety company was not bound for his future acts, and was not liable for the loans he made after his settlement. Laws 1852, ch. 164, not included in the Code, made the office of commissioner a part of the office of clerk. *Held*, that, while the statutes in a certain sense annexed the office of special commissioner to that of clerk, since they entitled the clerk to perform the duties of the office of commissioner and to receive its emoluments if he would execute a special bond under section 404, Shannon's Code, nevertheless there was no merger of the two offices, and, the duration of the appointment of a special commissioner

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not being limited by law, it might continue beyond the term of office of clerk if a successor to the commissionership were not appointed by the court when the individual ceased to be clerk. (*Post*, p. 316.)

Acts cited and construed: Acts 1849, ch. 150; Acts 1852, ch. 164.

Cases cited and approved: *State v. Cole*, 81 Tenn., 367; *Williams v. Bowman*, 40 Tenn., 679.

Case cited and distinguished: *State ex rel. v. Blakemore*, 54 Tenn., 638.

12. EQUITY. Liability of surety on bond. Effect of additional bond as commissioner.

Shannon's Code, sec. 405, provides that the court may take an additional bond from the clerk and master to secure the performance of his duties as commissioner, and that the clerk and his sureties shall be liable upon his bond as clerk, in the absence of such special bond, for his defaults as commissioner. Upon the expiration of a clerk's term of office a new bond was taken securing the performance of his duties as commissioner, and, when the surety on his bond as clerk was sued for a default as commissioner, it contended that the bond as clerk was displaced by the bond as commissioner, and that it was not liable on the bond securing the performance of the clerk's duties as such for his default as commissioner, subsequent to the taking of the new bond. *Held*, that the bond to secure duties as clerk was not displaced, in so far as it secured the commissioner's duties, since a direct order of the court to displace a bond is necessary, while the taking of the additional bond authorized by the statute could not harm the surety, as it operated to make the liability of the surety on the bond of the clerk for his default as commissioner secondary to its extent. (*Post*, p. 321.)

Code cited and construed. Sec. 402 (S.).

13. EQUITY. Liability of surety on bond. Order of court on settlement. Statutes.

Where the surety on the bond of a clerk of court, which Shannon's Code, sec. 405, provided should secure the performance of such

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clerk's duties as special commissioner in the absence of a special bond for that purpose, was sued for a default of such clerk as commissioner after his term as clerk had expired, and the court had made an order releasing him from liability on his "bonds," the surety's contention that the order released the clerk from his bond and liability as special commissioner, so that the surety was not liable for his defaults as such, was untenable, since the order referred only to the bonds required by sections 402 and 403 of a clerk, as such, his official bond, and his revenue bond. (*Post*, p. 322.)

Code cited and construed: Sec. 402 (S.).

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—T. H. HEISKELL, Chancellor.

JOHN JOHNSTON and T. K. RIDDICK, for appellants.

R. P. CARY, G. J. McSPADDEN and BIGGS & EVANS, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill in this case was filed to recover on the bond of T. B. Caldwell, and his sureties, as special commissioner of the chancery court of Shelby county. There were two bonds, one in the penalty of \$10,000, executed by the Fidelity & Deposit Company, and another of \$5,000, executed by T. B. Crenshaw and C. D. M. Greer as sureties. The chancellor decreed in favor of com-

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plainants, and the defendants have appealed to this court and assigned errors.

The gravamen of the bill was that Mr. Caldwell, as special commissioner, had, in violation of his duty, loaned certain moneys arising out of a sale of real estate in the case of *Overton v. Overton*, pending in the said chancery court.

It is first charged that he had no authority whatever to lend these moneys; secondly, if he had authority, he was directed in the order to secure the loan with the name of two sureties, and to submit the soundness of these sureties to the judgment of the court before paying out the money. It is also charged that the money was lent by him to persons who were his partners in a large business deal, and so practically for his own use; that these parties were on the brink of failure when the money was loaned to them, and soon thereafter failed.

There were two orders made concerning the lending of money by the commissioner. Before these orders were made the land above referred to had been ordered sold for reinvestment, and brought about \$30,000, the first payment \$5,000 in cash, and the remaining payments through a series of years divided into notes of about the same amount.

The first order to lend money was made on June 18, 1906. It recited that the purchaser had made further payments to the commissioner, that the commissioner had been unable, up to that time, to find any piece of

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real estate suitable for investment of the proceeds, and continued:

“It is therefore accordingly ordered, adjudged, and decreed that the said T. B. Caldwell, commissioner, shall, for the present, lend out the funds now in his hands at six per cent. interest per annum, to some responsible individual or individuals, corporation, or corporations, taking therefor the promissory note of the individual or individuals, corporation or corporations, to whom said fund is loaned, with good and solvent sureties thereon, or good collateral; said sureties or collaterals to be approved by said commissioner, payable thirty days after demand, with interest from date until paid. Said commissioner will report the loan or loans made by him under this order.”

The next order was made on June 25, 1907. This order recited that further payments had been made to the commissioner on account of the unpaid purchase money, and that he had been unable to find any real estate suitable for reinvestment of the proceeds, and then went on:

“It is therefore further ordered, adjudged, and decreed that the said T. B. Caldwell, commissioner, shall for the present lend out all of the funds now in his hands in this cause at six per cent. interest per annum, to some responsible individual or individuals, corporation or corporations, taking therefor the promissory note of the individual or individuals, corporation or corporations, to whom said fund is loaned, with two good and solvent sureties thereon, or good collaterals.

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said sureties or collaterals to be approved by the court, payable thirty days after demand, with interest from date until paid. The said commissioner will report the loan or loans made by him under this order.”

The first loan in controversy, one for \$3,500, was made in 1909, about two years after the orders were made, and the second, for \$7,500, was made in 1911, about four years thereafter.

The first question to be determined is whether either of the orders authorized a loan of moneys collected subsequent to the making of the orders. It is insisted in behalf of the defendant Caldwell that the orders continued to speak every day after they were made as to any moneys that might at any time thereafter be in his hands, although they had come into his hands from subsequent collections on the purchase money. In support of this proposition we are referred to a case wherein it was held that an order made by the trial judge directing the attorney-general to prefer an indictment against certain parties charged with crime was effective even at the next term of the court. We do not think this precedent is applicable. It might very well be that the court would direct moneys already in the hands of the commissioner to be lent out temporarily, but would refrain from making directions on this subject respecting installments to be collected years afterwards. In short, it would be very much more provident on the part of the court to refrain until the money should be in hand or was soon to be realized. We think the language “for the present” and

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“now in hand” indicates a clear restriction to the moneys then in the hands of the commissioner.

It necessarily follows that when he made the two loans complained of he acted in violation of his duty.

It is said, however, that in 1912 he made a full report of the transactions of his commissionership to the court, and therein catalogued the notes which he had taken, and turned in the notes, and that his report was confirmed, a successor was appointed, and he was discharged from further duties in respect of such commissionership. It is further said that no objection was raised on the subject at the time, and not until the present bill was filed. There is nothing in the record showing that any objection was made until the time stated, and the other facts are found in the record in substance as stated; but the order expressly reserved all matters not therein “specifically ordered.”

It is insisted that these facts show an adjudication in favor of the commissioner that he had acted correctly; at all events, a waiver of the irregularity. There could be no adjudication without an issue, and a waiver cannot be charged against the court from mere inaction. Nor do the facts stated amount to a condonation of the commissioner's wrong. It was thoroughly in harmony with every right of the commissioner, and with the rights of the persons entitled to the fund, that the court should receive the notes notwithstanding the fault of the commissioner, since thereby the rights involved would be secured as far as the notes might serve such end. The risk, however, in the meantime,

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would not be on the owners of the fund, or the duty of active diligence on the court, but these would rest upon the commissioner. He is presumed to have known that he had loaned the money without authority, and that the obligation lay on him to make the injury good.

It is insisted that Mr. Goodbar, the guardian of the minors; the owners of the fund, knew that the loans were being made and offered no objection. He denies this. But let it be assumed that he did consent; the result would be the same, because the fund was not under his control, but under the control of the court.

But, if we assume that the orders did authorize the lending of the money, the result must be the same. The last order would control. It required that two good and solvent sureties should be taken on the notes or good collaterals, "said sureties or collaterals to be approved by the court." Adopting the most favorable view of the record, only one surety was taken, if any was taken at all, and the name of this surety was not submitted to the court, nor was he approved by the court. There were no collaterals, so here was a clear breach of duty on the part of the commissioner. The same reasons stated in respect of the report and settlement of the commissioner must apply in this aspect of the case.

It is insisted that he was not bound to follow this order. He was appointed clerk and master and special commissioner of the court in the year 1900, and continued in the office of clerk and master until the fall of 1906. At that time he was succeeded as clerk and mas-

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ter by Mr. Lamor Heiskell, but retained his office of special commissioner in the *Overton Case*. While he was clerk and master his custom was to read the orders of the court, but, when he ceased to be such and was not with the records, he got out of that habit. So it was he did not read the order of the court directing the lending of the money. He supposed that the order was in the usual form, which permitted the commissioner himself to approve the securities placed on loans. It is insisted for him, in the brief of his counsel, that the solicitor for the complainants in the case notified him of the order to lend the funds, but failed to mention to him the special direction contained in the order concerning the submission of the names of the sureties to the court. There is no evidence to this effect, but if there were it would not make any difference. It was the duty of the commissioner to read the order for himself.

It is next insisted that no harm was done by the disobedience of the order, since the persons who signed the two notes, were solvent, and continued so from the making of the notes until several months after he made his settlement already referred to. The notes were signed by C. D. M. Greer and one Manigan. The weight of the evidence is that they were both solvent, and that Greer continued solvent for several months after the commissioner made his settlement. Do these facts excuse the commissioner for his failure to take two good and solvent sureties as ordered by the court. We cannot see our

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way clear to so hold. If the order of the court had been obeyed, then the notes might still be collectible, because of the solvency of the second surety. Moreover, such a decision would result in endless controversies as to whether the action of the commissioner was as good or better than the orders of the court, to say nothing of the absurdity of subordinating the court to the dominance of the commissioner. It is essential to the proper administration of justice that these orders shall be strictly obeyed by the officers of the court.

It is insisted for Mr. Caldwell that he acted with honesty and sincerity. Let this be granted. Such a conclusion, however, must be based on the assumption either that he had knowledge of the order and misconstrued it, or that he did not have knowledge of it. In either event he cannot be excused. If he had doubt as to the meaning of the order, he should have applied to the court for further instructions. If he had no knowledge of the terms of the order, he must bear the consequences of his negligence in failing to examine it. In neither aspect of the case would his honest purposes save him from liability.

The next question arises on the liability of T. B. Crenshaw as surety. His bond was in the following terms:

“T. B. Caldwell, as principal, and C. D. M. Greer and T. B. Crenshaw, as sureties, acknowledge ourselves indebted to the State of Tennessee in the sum of \$5,000.

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“The condition of the above obligation is such that, whereas the said T. B. Caldwell has been appointed commissioner by the chancery court of Shelby county, Tenn., in the case wherein M. G. Overton *et al.* are complainants and Elizabeth Overton *et al.* are defendants:

“Now, if the said T. B. Caldwell shall well and faithfully discharge the duties of said commissioner during the time he continues therein, or in the discharge of any part thereof, and shall account for and pay over what he receives under the orders and decrees of the court, then this obligation to be void; otherwise to remain in full force and effect.”

It is insisted that when Mr. Caldwell made his settlement and turned in the notes he performed every duty for which Mr. Crenshaw had obligated himself as surety. We are unable to assent to this view. If Mr. Caldwell loaned the money without authority, he failed to discharge the duty incumbent upon him to retain the money until ordered by the court to make disposition of it; or, if he loaned the money on terms other than those ordered by the court, he likewise failed to discharge his duty.

We shall now consider the additional points made by the solicitor for the guaranty company.

The chief contention is based on the fact that in the fall of 1906 Mr. Caldwell ceased to be clerk and master, made his settlement which was accepted by the court, and that he and his sureties were by order of the court discharged from liability on his “bonds” as clerk and

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master. The contention is that the office of special commissioner is an integral part of the office of clerk and master, and that, when Mr. Caldwell ceased to be clerk and master, he likewise ceased to be commissioner; therefore the surety company was not thereafter bound for any of his acts; hence was unaffected by any liability for the loans he made after he ceased to be clerk and master.

There is apparently some confusion in our authorities upon the subject whether the commissionership is an integral part of the office of clerk and master. It results from the terms of certain statutes and the constructions placed on them by the court. We believe the simplest way to dispose of the matter is to refer to the sections of Shannon's Code bearing on the subject, and then to mention a provision of Acts 1852, ch. 164, which was omitted from the Code. The failure to note the omission of this provision seems to have produced the confusion.

Section 402 provides that every clerk of a court before entering upon the duties of his office shall enter into bond with sufficient surety to the satisfaction of his court, in the sum of \$10,000, payable to the State, and conditioned for the safe-keeping of the records, and for the faithful discharge of the duties of his office. The next section directs that a bond shall be executed in the sum of \$5,000, conditioned to account for and pay over all sums arising from taxes on suits, fines, and forfeitures "which have come, or ought to have

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come to his hands." The next three sections read as follows:

"404. The several courts may also require their clerks to give bond, with good security, in such sum as the court may deem sufficient to cover property or funds which may at any time come to the hands of such clerks as special commissioners or receivers, by appointment of the court or any judge thereof.

"405. The failure of the clerk to execute the special bond provided for in the last section, shall not subject him to any penalty, but the court may confide the particular business to such other person as will give the required security, and, in the absence of such special bond, the clerk and his sureties will be liable, on the regular official bond, for all property or money with which such clerk may be properly chargeable as special commissioner or receiver.

"406. The court may also require special bonds to meet particular exigencies, and in a suitable penalty, whenever, in its judgment, the interest of suitors renders it necessary, subject to the provisions of the last preceding section."

In the case of *State ex rel. v. W. H. Blakemore*, 7 Heisk. (54 Tenn.), 638, 653, 654, the court seems, in substance, to have held that Acts 1852, ch. 164, made the office of commissioner a part of the office of the clerk. This was based upon a comparison of Acts 1849, ch. 150, with the act just referred to. The fact is mentioned in the opinion that the second section of the act of 1849 requires a special bond as special com-

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missioner, and it was said that the very terms of the act showed that this bond was intended as special, not general, but that Acts 1852, ch. 164, seemed to have superadded the duties of commissioner to those of clerk, and declared the office vacant if the clerk should fail to give this bond. The learned justice continues:

“So it is plain that the office of commissioner, under the latter act, is a part of the office of clerk. It is in the discretion of the clerk under the first act to accept or decline the appointment of commissioner; but under the last he has no discretion, but must lose his office as clerk if he declines that of commissioner.”

The court adds, in a later sentence:

“There can be no escape from this conclusion, in view of the terms of the third section of Acts 1852, ch. 164, ‘that if any clerk in this State shall fail or refuse to execute his bonds as required by the foregoing sections of this act, then and in that case, the court whose clerk thus fails to give bond as above stated, shall forthwith declare said clerk’s office vacant, and shall forthwith proceed to fill said vacancy, as required by law in cases of vacancy.’ ”

But it is to be noted that the Act of 1852 was not carried into the Code, and section 405 practically repeals so much of it as appears in the language last quoted. It is observed from the contents of that section previously given that the failure of the clerk to execute the special bond as commissioner “shall not subject him to any penalty,” which means that he will not forfeit his office by failure to give the bond. The

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section further provides that the court may confide the business of commissioner to any one else who will give a proper bond, and, in case no such person can be found, then the duties shall be a part of the clerk's duties, for which he will be responsible on his bond. To particularize a little further, the clerk may execute a special commissioner's bond under section 404, and in that case he will be entitled to perform the duties of that office, and to receive the emoluments, and in the event he fail to execute such bond, the court may devolve the duties upon some other person who may give suitable bond, and in case such other person cannot be found, then it will be a part of the clerk and master's duty under his regular official bond. In *State v. Cole*, 81 Tenn. (13 Lea), 367, 375, 381, the soundness of *State ex rel. v. Blakemore* is doubted. In *State v. Cole*, it was not necessary to settle the precise question we have before us, but a perusal of the opinion in that case will show that it is in substantial harmony with the view we have herein expressed. This case approves the earlier case of *Williams v. Bowman*, 3 Head, 679, wherein it was held that, while the law did in some sense annex the office of special commissioner and receiver to that of clerk, it did not result in a merger of the former into the latter, and that, the duration of the appointment of special commissioner not being limited by law, it might continue beyond the term of the office of clerk, if a successor to the commissionership should not be appointed by the court. We have other

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cases upon the subject, but what we have said contains the substance of all of them.

It is insisted by the guaranty company that the taking of the additional bond for \$5,000 executed by Crenshaw and Greer was intended as in lieu of its bond, and for that reason it is exonerated. This contention is based on the argument that, with the bond of the guaranty company outstanding, there was no need of another bond, and the further argument that the order for the new bond indicated, as a reason for its taking, the expiration of Mr. Caldwell's term as clerk and master. Even if it be conceded that there was no need for the additional bond, and that its taking was based on the erroneous assumption, as matter of law, that the expiration of the clerk and master's term rendered such new bond essential, on the theory that the office of commissioner was inextricably bound up with the office of clerk and master, still this would not result in the displacement of the guaranty bond. To effect that purpose a direct order to that end was necessary. Such matters cannot be left to mere inference. Moreover, it was within the power of the court, under section 405 of Shannon's Code, to take additional bonds at any time; besides, the additional bond wrought no harm to the guaranty company, since, as the chancellor correctly held, the result of taking the second bond was to make the liability of the sureties thereunder a primary one to the full extent of its penalty and the liability of the guaranty company to that extent secondary.

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It is urged by the guaranty company that when Mr. Caldwell made his settlement as clerk and master in the fall of 1906, and an order was entered releasing him from his "bonds," he was thereby released from his bond as special commissioner. This position is untenable. The bonds referred to were his official bonds as clerk and master required by Shan. Code, section 402, and his revenue bond required by the next section. No reference was had to his bond as special commissioner. That matter was not up for consideration.

The foregoing matters cover all of the assignments of error. None of the assignments being well taken, they must all be overruled.

Defendants will pay the costs of the appeal.

Trust Co. v. McDougald.

CITIZENS' TRUST CO. *v.* McDOUGALD.*(Jackson. April Term, 1915.)***1. BILLS AND NOTES. Consideration. Antecedent debt.**

Although under the Negotiable Instruments Law (Laws 1899, ch. 94) a pre-existing debt may stand for value, yet, where the maker of a note made it payable directly to plaintiff bank, which paid him nothing therefor, he being induced to make the note by the bank's cashier, who was practically the owner of an insolvent corporation which owed the bank money, to reduce which debt the note was applied, there could be no recovery by the bank on such note, since a pre-existing debt is not consideration for a note, where the debt was worthless and the obligation of a third party. (*Post*; p. 324.)

Cases cited and approved: *Williams v. Nichols*, 10 Gray (Mass.), 83; *Gilbert v. Brown*, 123 Ky., 703; *Didlake v. Robb*, 1 Woods, 680; *Paxson v. Nields*, 137 Pa., 385; *Schroeder v. Fink*, 60 Md., 436; *Smith v. Paris*, 53 Mo. 274; *Banking Co. v. Hall*, 119 Tenn., 548.

2. BILLS AND NOTES. Pleading. Amendment. Allowance.

In a bank's suit on a note defended on the ground of want of consideration, as it originated in fraud practiced by the bank's cashier upon the defendant maker, where the affidavit for the filing of an amended answer, differing from the original answer merely in the evidentiary facts stated as proof of want of consideration, justified the mistake in the original answer on the ground that counsel representing the defendant, a nonresident, had acted on certain memoranda found among the papers of defendant's first attorney, who had died, such affidavit was a sufficient reason for the allowance of the amendment. (*Post*, p. 326.)

Case cited and approved: *Hardwick v. American Can. Co.*, 115 Tenn., 393.

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3. **BILLS AND NOTES. Pleading. Amendments. Allowance.**

In a bank's action on a note, where the bank was familiar with the fraudulent transactions of its cashier in which the note originated, and the defendant was completely in the dark as to the details, the allowance of an amended answer differing from the original answer merely in the evidentiary facts which it stated as proof of lack of consideration for the note was proper. (*Post*, p. 326.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Judge.

H. R. BOYD, for appellant.

ISRAEL H. PERES and L. C. GOING, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Bill to recover on a promissory note of \$15,000 executed by McDougald to the Pemiscot County Bank, of Pemiscot county, Mo. Judgment was rendered below in favor of the defendant, dismissing the suit.

1. The judgment was correct. There was no consideration for the note. It is true that, under the Negotiable Instruments Law, contrary to the rule formerly prevailing in this State, a pre-existing debt may now stand for value; but this is not true where such pre-existing debt was worthless at the time, and the obligation of a third party. *Williams v. Nichols*, 10 Gray

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(Mass.), 83; *Gilbert v. Brown*, 123 Ky., 703, 97 S. W., 40, 7 L. R. A. (N. S.), 1053; *Didlake v. Robb*, 1 Woods, 680, Fed. Cas., No. 3899; *Paxson v. Nields*, 137 Pa., 385, 20 Atl., 1016, 21 Am. St. Rep., 888; *Schroeder v. Fink*, 60 Md., 436; *Smith v. Paris*, 53 Mo., 274; 1 Dan. Neg. Inst. (6th Ed.), 256, 257. Such was the present case. The bank was not, therefore, a holder for value. *Banking Co. v. Hall*, 119 Tenn., 548, 564, 565, 108 S. W., 1068.

In the case before us it appears the note was made payable directly to the bank. Nominally there was a loan to McDougald, but the bank paid out no money. It simply credited the proceeds on a worthless note which it held on the People's Gin Company, an insolvent corporation, for whose obligations McDougald was in no way responsible. This fraudulent scheme was made effective through the machinations of one Tindle, the bank's cashier, who took advantage of McDougald's kinship to him, his friendship for him, and his confidence in him. Tindle was practically the owner of the insolvent corporation referred to. He induced McDougald to make the note to the Pemiscot County Bank for its "accommodation." This "accommodation" turned out to be a plan to enable the bank to collect its insolvent note on the People's Gin Company. McDougald had no notice or intimation that such use was to be made of his note. He was simply tricked by Tindle. The bank can stand no higher than Tindle, since it gave no value for the note. The complainant is receiver of the bank, and can assert no higher rights.

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2. Error is assigned on the action of the chancellor in permitting the filing of an amended answer. There was no error in this, since there was no negligence, and justice required the amendment. Gibson's Suits in Chancery (2d Ed.), sections 434, 435. A sufficient reason was given in the affidavit for the mistake made in the original answer. This was, in substance, that the counsel now representing the defendant, a nonresident, acted on certain memoranda found among the papers of Mr. Percy Finley, the original counsel, who had died. Moreover, there was no such incongruity between the original and amended answers, as was shown in the case of *Hardwick v. American Can Co.*, 115 Tenn., 393, 89 S. W., 735, 1 L. R. A. (N. S.), 1029, cited by complainant's counsel. The substance of each of the answers was that there was no consideration for the note. The difference was merely in the evidentiary facts stated as proof of the absence of consideration. Besides this, no harm or inconvenience was suffered by complainant through the amendment. The bank all the time knew the real facts, and the case was prepared on each side, from the beginning, in view of the theory of defense set forth in the subsequently filed amended answer. Furthermore, the relation of Mr. McDougald to the matter was such as to entitle him to some indulgence, inasmuch as he was wholly in the dark as to the real transaction; Tindle having procured the note by the means previously stated, and having used it in a manner which could not have been anticipated by his victim.

Parker v. State.

PARKER v. STATE.*

*(Jackson. April Term, 1915.)***1. WITNESSES. Conduct of trial. Cross-examination by trial Judge.**

In a criminal prosecution the action of the court in not permitting counsel for the State to cross-examine defendant and in undertaking to do so himself, framing exceedingly sharp questions, and, after defendant's own counsel had had defendant for a short time, in resuming cross-examination which totaled one-third of the defendant's personal testimony, was reversible error. (*Post*, p. 328.)

2. WITNESSES. Impeachment of own witness. Character.

In a criminal prosecution, where the defendant was called in rebuttal for the State, the action of the assistant district attorney-general in asking him whether his whole life for the past fifteen years had been so crooked, devious, and so utterly devoid of morality or honesty that his reputation for dishonesty was so well known that the county court, without even considering his petition, refused to give him a certificate of good character, notwithstanding the fact that defendant's general character had not been put in issue, was a denial of a fair trial and reversible error. (*Post*, p. 329.)

FROM SHELBY.

Appeal from the Criminal Court of Shelby County.—
RALPH DAVIS, Special Judge.

SAMUEL O. BATES, for appellant.

*As to power of court to cross examine, see note in 57 L. R. A., 882. As to interrogation of accused by court, see note in 15 L. R. A., 674.

The right to impeach one's own witness is discussed in note in 21 L. R. A., 418.

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WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. CHIEF JUSTICE NEIL delivered the opinion of the
Court.

The plaintiff in error was arraigned in the criminal court of Shelby county under an indictment containing two counts—the first charging him with obtaining money under false pretenses; and the second charging him with larceny. He was convicted and sentenced under the first count. From this judgment he has appealed and assigned errors.

The judgment must be reversed because of the improper conduct of the trial judge and of the assistant district attorney-general.

1. His honor, instead of permitting the counsel for the State to conduct the cross-examination of the plaintiff in error, in the main took charge of this matter himself. This circumstance alone could not have failed to impress the jury that the trial judge was hostile to the prisoner. In addition to this, the language used in framing the questions was sometimes exceedingly sharp, and at all times closely resembled similar performances on the part of opposing counsel. After seven pages of the transcript had been thus used the prisoner was turned over to his own counsel, but the latter had brought out material covering only four or five lines, when his honor took the witness in hand again, and cross-examined him to the extent of two more pages. The prisoner was recalled by the State

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in rebuttal, and the trial judge again took him in hand and examined him for two additional pages. Thus we have eleven pages of the transcript, comprising fully a third of the prisoner's personal testimony taken up with his cross-examination by the presiding judge, and conducted in a manner not at all appropriate to questions propounded by that officer. While it is true that the judge may ask questions now and then for the purpose of clearing up points that seem obscure, and supplying omissions which the interests of justice demand, it is not proper that he conduct an extended examination of any witness, and particularly a prisoner on trial for his liberty or his life. Such a practice, if tolerated by this court, would be far more hurtful to the administration of justice than the escape of many prisoners. It is essential that trials shall be managed fairly, and that trial judges shall not only be just to both sides, but that they shall observe in their demeanor an even tenor, so that an impartial state of mind may be apparent to all concerned.

2. The improper conduct on the part of the assistant district attorney-general was this: The prisoner was called in rebuttal by the State, and hence became the State's witness. Yet, notwithstanding this fact, and notwithstanding the further fact that he had not put his general character in issue, the assistant district attorney-general, asked him the following question:

“Don't you know your whole life in the city of Memphis, for the past fifteen years, has been such, and has been so crooked, and so devious, and so utterly devoid

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of morality, or honesty, that your reputation for dishonesty is so well known that the county court, without even considering your petition, refused to give you a certificate of good character?"

Over the objection of the prisoner's counsel, the trial judge permitted this question to be asked. No one can doubt that this was highly improper, both on the part of the trial judge and of the assistant district attorney-general conducting the case.

It is impossible to say, under the facts stated, that the prisoner has had his constitutional right of a fair and impartial trial. On this ground the judgment must be reversed, and the cause remanded for a new trial.

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KINNANE v. STATE.*

(Jackson. April Term, 1915.)

INTOXICATING LIQUORS. Criminal offenses. Place of sale.

Acts 1899, ch. 161, provides that any person selling intoxicating liquors without a license shall be guilty of a misdemeanor. Shannon's Code, sec. 6783, provides that the article as to selling liquors is to be construed liberally to prevent evasions and effectuate the objects had in view. *Held*, that where a person went upon a steamboat on the Mississippi river for the purpose of purchasing, and was received on the boat by those operating it for the purpose of selling him, intoxicating liquors, and the boat thereupon ran into the river across the State line, and after a sale of liquor was made by its barkeeper looped back to the Tennessee shore and landed the purchaser near the point from which he started, the barkeeper was guilty of a violation of the statute.

Acts cited and construed: Acts 1899, ch. 161.

Cases cited and approved: *Duff v. Commonwealth*, 153 Ky., 657; *Kinnane v. State*, 106 Ark., 280; *Lemore v. Commonwealth*, 127 Ky., 480.

Cases cited and distinguished: *Adair v. Commonwealth*, 89 S. W., 1132; *Merritt v. Commonwealth*, 92 S. W., 611; *Fopplano v. Speed*, 199 U. S., 501.

FROM LAUDERDALE.

Appeal from the Circuit Court of Lauderdale County.—S. J. EVERETT, Judge.

STEELE & STEELE and E. L. WESTBROOK, for appellant.

*As to the place of sale of intoxicating liquor, see note in 44 L. R. A. (N. S.), 437.

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WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE WILLIAMS delivered the opinion of the
Court.

Plaintiff in error, Kinnane, was convicted on a charge of selling intoxicating liquor without a license in violation of statute, and has appealed and assigned errors.

Kinnane was keeper of a barroom on a steamboat, the Harry Lee, which plied the Mississippi river from Memphis northward to Ashport, in Lauderdale county.

There was proof tending to show that on one of its trips the boat made its regular landing at Ashport, and that a number of persons went aboard for the purpose, on their part, of making purchases of whisky, among them James Wilson, a witness for the prosecution; that they were received by the boat's management, not as good-faith passengers, but with the confessed intention, on the part of those operating the boat, including Kinnane, of selling them intoxicating liquors; that on approaching the landing at Ashport, the barroom was locked; that the boat was run out into the river and beyond the Tennessee boundary line, when the barroom was opened, a quart of whisky passed in exchange for money to Wilson so on board, whereupon the boat looped back to the Tennessee shore, landed near the point from which it started, and there Wilson, with his purchase, debarked.

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Acts 1899, ch. 161, to which the indictment is referable, provides:

“That any person or persons selling or aiding in selling in any way whatever, intoxicating liquors, without license required by law, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars, nor more than two hundred dollars, and imprisonment in the county jail or workhouse for a period of six months, for each and every offense.”

By legislation pronouncement, the laws in relation to illegal sales of liquors “are to be construed liberally, so as to prevent evasions and subterfuges, and to effectuate the objects had in view.” Code (Shannon), section 6783.

That portion of the trial judge’s instructions to the jury assigned by appellant to be erroneous is:

“If you find from the proof in this case that the State’s witness, Wilson, was taken upon the Harry Lee, a steamboat, at Ashport, in Lauderdale county, Tennessee, with others or alone, and that it was his purpose in getting on said boat to buy intoxicating liquors, and was also the purpose of those operating said boat and the defendant in taking him on the same to sell him intoxicating liquors, and that, after he was taken upon said boat or got upon the same in Lauderdale county, that said boat was backed out into the Mississippi river and was run out in said river across the channel of said river and across the western boundary of the State of Tennessee and Lauderdale county and

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into the State of Arkansas, and that the defendant was the barkeeper on said boat, and that while said boat and said witness were in said river, across the main channel and in the State of Arkansas, that the defendant sold to the said State's witness whisky or intoxicating liquor, and then said boat was run back to the Tennessee shore, and the said witness or others were permitted to get off of said boat, then I charge you that the defendant would be guilty."

It is the contention of Kinnane that, under the facts outlined, any sale so made by him was made without the jurisdiction of this State, since the money was passed and the liquor delivered beyond the western boundary line of Tennessee.

We are required by the quoted statute to look behind the technical phase of the transaction if necessary "to prevent evasions and subterfuges." When we do this we think it is apparent that Wilson was taken on the boat for the purpose of evading the statute and defeating "the objects had in view" when our liquor laws were enacted. The loop made by the boat (with the exchange of liquor and cash near midstream but just beyond the State line) was intended to serve as a cloak for the real transaction; the purpose from the outset of both vendor and vendee being that Wilson, with the liquor, should be landed back on the Tennessee shore. The delivery of the whisky may well be referred to the Tennessee shore, when substance and not mere form is looked to.

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The court of appeals of Kentucky had to deal with a similar transaction in the case of *Lemore v. Commonwealth*, 127 Ky., 480, 105 S. W., 930. There Lemore, the owner of a gasoline boat, had been convicted of selling intoxicating liquors, in violation of law, to one Sutberry. It appeared that, as the boat was going down the Mississippi river on one of its trips it stopped at Mabel, a Kentucky landing, to put off freight for Sutberry, who got on the boat, and, after it had drawn near the Missouri shore, he bought of Lemore a quart of whisky. The boat then came back to Skaggs, a landing about one mile below the point where Sutberry embarked. Sutberry got off there. His purpose in making the loop was to buy the whisky. He paid no fare on the boat and was not asked to do so. In Kentucky, also, it is provided by statute that no trick or subterfuge shall be allowed to evade the operation or defeat the policy of the law against the sale of liquors. The court in reference to these facts, the statute in relation to evasion, and the earlier cases of *Adair v. Commonwealth*, 89 S. W., 1132, 28 Ky. Law Rep., 659, and *Merritt v. Commonwealth*, 92 S. W., 611, 29 Ky. Law Rep., 184, said:

“It is manifest from the proof that Sutberry got on the boat for the purpose of buying the whisky, and that he waited until the boat got over on the Missouri side of the stream for the purpose of evading the Kentucky laws. It may also be inferred that Lemore, in carrying Sutberry from Mabel and bringing him back to Skaggs landing, which was as near his home as

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Mabel, was actuated by the motive of selling him the whisky. . . . While the evidence is not precisely the same, when taken as a whole, it as well shows an evasion of the statute as the proof in either of the two cases cited. Lemore is engaged in interstate commerce. The State of Kentucky may not interfere with interstate commerce; but when he takes a man from Kentucky out in the river to sell him whisky, and then brings him back to Kentucky, he is not engaged in interstate commerce, but simply selling whisky in evasion of the laws of Kentucky. *Foppiano v. Speed*, 199 U. S., 501, 26 Sup. Ct., 138, 50 L. Ed., 288. If he had sold the whisky while his boat was lying at the bank at Mabel, unquestionably he would be liable, as the thread of the stream is the State line; but when he took the proposed purchaser out beyond the thread of the stream to sell him whisky, and then brought him back to the Kentucky shore, the whole transaction will be looked at, and the sale will be regarded as made, not at the point at which the whisky was delivered and the money paid, but on the Kentucky shore, where it was begun, and where it was consummated. In *Adair v. Commonwealth*, supra, we said: 'When an act is made up of a series of events and is criminal in its result, all the occurrences leading up to the consequence need not be done within the jurisdiction where it is sought to be punished. It is enough if the result in that jurisdiction constitutes an offense. To dispose of liquor by a sale in a local option district in this State under our statutes is an offense, if done by another than a man-

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ufacturer. If, to accomplish the criminal acts, the vendor executes parts of it outside of the prohibition district, yet all so connected with some part of the transaction in the district that the result is the same as if all had occurred there, the act is as much a crime against the law as if it had all occurred there. It is not the payment for liquor that is aimed to be prohibited, nor is contracting for liquor the mischief aimed at. It is the furnishing it within the excluded territory that is the particular vice intended to be suppressed.' "

The above case of *Lemore v. Commonwealth* has been reaffirmed in *Duff v. Commonwealth*, 153 Ky., 657, 156 S. W., 150.

In the case of *Kinnanne v. State*, 106 Ark., 280, 153 S. W., 583, the facts specially found were that the defendant was in charge of a room, on the same boat, the Harry Lee, in which intoxicating liquors were held for sale; that the steamer landed on the Arkansas shore and received the prosecuting witness for the purpose of selling him liquor; that witness was carried to a point east of the boundary line of Arkansas in the Mississippi river, where the sale was made, and the witness was then returned and discharged at said landing in Arkansas. The court held, in an opinion by Mr. Chief Justice McCulloch, that a finding that the intoxicating liquors were thus kept for sale in violation of law would suffice to support the judgment of conviction. In Arkansas there is a statute in respect of sales

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of intoxicating liquors by device. See, also, *Kinnanne v. State*, 106 Ark., 337, 153 S. W., 264.

We are therefore of opinion that the circuit judge committed no reversible error in the charge so given and challenged and that the judgment should be affirmed. So ordered.

MR. JUSTICE BUCHANAN dissents.

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PARLOW v. TURNER.

(*Jackson*. April Term, 1915.)

1. STATUTES. Title. Sufficiency.

The title of Acts 1913, ch. 26, entitled "An act to remove the disabilities of coverture from married women and to repeal all acts and parts of acts in conflict with the provisions of this Act," is sufficient, within Const., article 2, section 17, declaring that no bill shall embrace more than one subject, to be expressed in the title, to justify provisions in the body of the act abrogating the common-law disabilities of married women, and declaring that every married woman shall have the same capacity to acquire, control, enjoy, and dispose of all property, to make any contract in reference to it, and to bind herself personally, as if unmarried. (*Post*, p. 342.)

Acts cited and construed: Acts 1913, ch. 26.

Constitution cited and construed: Art. 2, sec. 17.

2. CONSTITUTIONAL LAW. Husband and wife. Rights of husband. Statutory provisions.

Acts 1913, ch. 26, abrogating all common-law disabilities of married women, and providing that every woman, now married or hereafter to be married, shall have the same capacity to acquire, enjoy, and dispose of all property and to make any contract in reference thereto as if she were not married, is not invalid as destroying any vested rights of a husband in a marriage occurring prior to the passage of the act, and his wife may recover the rent of land purchased by her prior to the marriage. (*Post*, p. 342.)

Acts cited and construed: Acts 1879, ch. 141; Acts 1849-50, ch. 36.

Cases cited and approved: *Lucas v. Rickerich*, 69 Tenn., 726; *Taylor v. Taylor*, 80 Tenn., 490; *Baker's Ex'rs. v. Kilgore*, 145 U. S., 487; *Ables v. Ables*, 86 Tenn., 333.

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Cases cited and distinguished: *Guion v. Anderson*, 27 Tenn., 325.

Code cited and construed: Sec. 4234 (S.).

FROM MADISON.

Appeal from the Circuit Court of Madison County.—
S. J. EVERETT, Judge.

H. E. PEARSON, for appellant.

L. L. FONVILLE, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The plaintiff and his wife intermarried during the year 1909. A short time prior to the marriage the wife had purchased and obtained a deed in fee to two small tracts of land lying in Madison county. After the marriage they lived together about two years, and then voluntarily separated, and have since lived apart. No children were born to the union. Subsequent to the separation the husband contributed nothing to the maintenance of his wife. Her only support has been the rent of the two small tracts, which she has been leasing to tenants at a monthly rental in her own name. The husband made no objection to this course of action on her part until June, 1914. He then demanded of the tenant, J. W. Turner, certain arrears of rent which had accrued, subsequently to the passage and going into effect of an act of 1913, presently to be more partic-

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ularly mentioned. The tenant refused to pay the husband, but instead made payment to the wife. Thereupon the present suit was brought by the husband against Turner, before a justice of the peace, to recover the rent, and an appeal was prosecuted from that court to the circuit court of the county. The circuit judge gave a peremptory instruction in favor of Turner. The case, without going through the court of civil appeals, was brought directly to this court, because its determination was supposed to involve the constitutionality of chapter 26 of the Acts of 1913.

That act reads as follows:

“A bill for an act to be entitled ‘An act to remove disabilities of coverture from married women, and to repeal all acts and parts of acts in conflict with the provisions of this act.’

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women, and its effect on the rights of the property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and to do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all prop-

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erty, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.”

The second section repeals all acts and parts of acts in conflict, and the third and last fixed January 1, 1914, as the date on which the act was to take effect.

1. It is said the act is unconstitutional because it violates so much of article 2, section 17, of the Constitution, as provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title.

There is but a single subject, and that appears fully in the title, viz., the relief of married women from the disabilities of coverture. That subject fully covers every element that is written into the body of the act. The first clause, standing alone, “that married women be, and are, hereby fully emancipated from all disability on account of coverture,” would have made thoroughly effective the purpose expressed in the title. All that followed merely amplified the thought, but each term of particularization lay implicit within the clause quoted.

The act, therefore, does not offend against the section of the Constitution referred to.

2. If the act be given full operation according to its terms, does it, under the facts of the present case, destroy any vested right of the husband?

The rights acquired at common law, in the wife's land by the husband, through marriage, aside from tenancy

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by the curtesy, are thus described in *Guion v. Anderson*, 8 Humph., 325:

“By marriage, the husband gains an estate of freehold in the inheritance of his wife, in her right, which may continue during their joint lives. . . . He is not, however, solely seized, but jointly with his wife. The technical phraseology of the common-law pleaders, to express the interest of the husband in the estate of his wife, is ‘that husband and wife are jointly seized in right of the wife.’ ”

In exercise of the right so acquired, he was entitled to take the rents and profits of the land and appropriate them to his own use. 3 Mod. Am. Law, 440; 5 Id., 261.

These common-law rights were materially modified in this State, by statute, long prior to the passage of the act of 1913. As early as the assembly of 1849-50 (chapter 36), an act was passed forbidding the husband to sell or incumber the wife’s land, except by a joint deed executed by the two spouses, the wife joining in the manner prescribed by law for the conveyance of land by married women, also forbidding his interest to be sold under execution during the life of the wife, and forbidding the dispossession of the husband and wife. Shan. Code, section 4234.

It was held, however, that, notwithstanding this section of the Code the rents of the wife’s land could be seized and appropriated to the husband’s debts. *Lucas v. Rickerich*, 1 Lea (69 Tenn.), 726. The theory of the decision was that the common-law estate of freehold

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in his wife's general real estate was not by the statute and Code section referred to converted into a separate estate; therefore his right to the rents remained unimpaired. But in that case, as remarked of it in a later one, it appeared that the rents in controversy there had already accrued, and that the future productions of the land were not considered, or even thought of.

The next legislature that assembled, probably as a result of the foregoing decision, passed an act to the effect that the rents and profits of the property or estates of married women should not thereafter be subject to the debts or contracts of their husbands, except by the consent of such married women obtained in writing, with a proviso that the act should not interfere with the husband's tenancy by the curtesy. Acts of 1879, ch. 141.

An attack was soon made on this statute on the ground that it interfered with the husband's vested estate which he had acquired in the wife's land by virtue of the marriage, or what had been left of that estate by the act of 1849-50, *supra*. A creditor of the husband, holding a debt created prior to the act of 1879, levied on some corn which grew on the wife's land subsequent to the passage of the act. The wife resisted the creditor's appropriation of the corn, and her contention prevailed. It was held that the right of the husband to the profits of the wife's land was a contingent one, as applied to each successive year's crop, dependent, not only upon the continuance of his *status*

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as husband, the continuance of the wife's ownership of the land, the absence of a decree of settlement on her by a court of equity, but also upon the actual future production of a crop, and that, before the crop had been grown, the legislature might intervene, and either qualify or destroy his interest, in such future crops. *Taylor v. Taylor*, 12 Lea (80 Tenn.), 490.

The act was subsequently attacked as being in violation of the federal constitution, both on the ground that it interfered with vested rights, and that it impaired the obligation of a contract. This creditor, likewise holding a judgment rendered against the husband prior to the passage of the act, had levied on certain cattle which, within the meaning of the act, were profits of the wife's lands. The cattle were sold under the execution, and bought by the execution creditor. The wife brought a replevin suit for the cattle. The trial court rendered judgment in her favor, and on appeal to this court that judgment was affirmed. Subsequently the case was taken to the supreme court of the United States on writ of error, and there the judgment of this court was affirmed. *Baker's Ex'rs v. Kilgore*, 145 U. S., 487, 12 Sup. Ct., 943, reported in 36 L. Ed., 786, *sub nom. Neilson v. Kilgore*.

That court, after referring to the statutes, and the cases we have already mentioned, said:

“We do not doubt the validity of the act of 1879, as applied to the judgment properly rendered against Scruggs. The particular profits of the wife's estate here in dispute had not, when that act was passed,

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come to the hands of the husband. They were not, at that time in existence, nor in any legal sense vested in him. Nor were they ever vested in him. He had a mere expectancy with reference to them when the act was passed. Moreover, his right, prior to that enactment, to take the profits of his wife's estate, did not come from contract between him and his wife, or between him and the State, but from a rule of law established by the legislature, and resting alone upon public considerations arising out of the marriage relation. It was entirely competent for the legislature to change that rule, in respect, at least, to the future rents and profits of the wife's estate. Such legislation is for the protection of the property of the wife, and neither impairs nor defeats any vested right of the husband. Marriage is a civil institution, a *status*, in reference to which Mr. Bishop has well said: 'Public interests overshadow private—one which public policy holds specially in the hands of the law for the public good, and over which the law presides in a manner not known in the other departments.' 1 Bishop on Marriage, Divorce, and Separation, section 5. The relation of husband and wife is, therefore, formed subject to the power of the State to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those principles which have been established for the protection of private and personal rights against illegal interference.

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“The act of 1879 did not infringe any vested right of the husband, much less did it infringe any right belonging to his creditors.”

The act of 1879 again came up for consideration in the case of *Ables v. Ables*, 86 Tenn., 333, 9 S. W., 692. That was a contest between the husband and wife. She had rented her land to one Harlow. The husband objected, and brought an action of unlawful entry and detainer against the wife's tenant. She filed a bill in equity to enjoin the prosecution of the action. The wife's bill was dismissed. In support of her bill she insisted that she was entitled to the absolute control of the land. The court held that this view was erroneous; that while the rents and profits of the wife's lands could not, under the act referred to, be subjected to the claim of the husband's creditors, and while he could not contract them away, without the consent of the wife in writing, yet as governor of the family, the head of the house, he had the right to rent out her lands, and to collect the rents for the benefit of the family.

This bare privilege was all that the act of 1879 left to the husband in respect of the rents and profits of the wife's lands, aside from such rights as he might have as tenant by the curtesy. This was the *status* when the act of 1913 was passed.

The facts of the present case do not raise any question of curtesy, only the husband's right to collect the rents, accrued after the last-mentioned act went into effect.

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The question must be resolved on the principles applied to the act of 1879, the contingent nature of the husband's right as to future rents, and the power of the legislature to interfere before the contingency has ceased, and the right has developed into one *in praesenti*. We deem it unnecessary to consider how far the matter may properly rest upon the extraordinary power which the legislature possesses over the marriage relation and the property rights of the pair *inter sese*, for the public good, referred to in the opinion of Mr. Justice Harlan, just quoted.

On the grounds stated, we are of the opinion that, under the act of 1913, Mrs. Parlow had the right to collect the rents from her tenant Turner, and therefore that the latter was within his rights when he paid the money to her.

It may be true that the husband, by living apart from his wife, without her fault, abandoned his powers and duties as governor of the family, and hence his right to either rent out the land, or to collect the rents; but we do not decide this question, preferring to rest our judgment upon the broader ground.

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*(Jackson. April Term, 1915.)***1. CRIMINAL LAW. Felony. Presence of accused during trial.**

In a felony case accused must be present during his trial in the circuit court, criminal court, or other court of original jurisdiction. (*Post*, p. 352.)

Acts cited and construed: Acts 1901, ch. 102.

Cases cited and approved: *Perce v. State*, 118 Tenn., 765; *Hopt v. Utah*, 110 U. S., 574; *Lewis v. United States*, 146 U. S., 370.

2. CRIMINAL LAW. Appeal. Presence of accused during hearing on appeal. "In all criminal prosecutions."

In a felony case accused, confined in the penitentiary under Acts 1901, ch. 102, pending his appeal, or at large on bond, need not be present in the supreme court when hearing or deciding the case, notwithstanding Const., art. 1, sec. 9, providing that in all criminal prosecutions accused shall have the right to be heard by himself and his counsel, which applies only to the trial court; the phrase "in all criminal prosecutions" applying only to a trial prosecuted by the State, which does not include a review on appeal or writ of error, which is a proceeding brought by accused himself. (*Post*, p. 353.)

Case cited and approved: *King v. Speake*, 3 Salk., 358.

Cases cited and distinguished: *Phleming v. State*, Minor (1 Ala.), 42; *State v. Overton*, 77 N. C., 485; *State v. David*, 14 S. C., 428; *Donnelly v. State*, 26 N. J. Law, 463; *Fielden v. People*, 128 Ill., 595; *Schwab v. Berggren*, 143 U. S., 442.

Code cited and construed: Sec. 6336 (S.).

Constitution cited and construed: Art. 1, secs. 9, 13.

3. CRIMINAL LAW. Appeal. Procedure. Rights of accused.

Const., art. 1, sec. 17, guaranteeing due course of law, gives to accused the right to present his case to the supreme court

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on appeal or writ of error either in person or by counsel, and the court will seldom deny accused's request for permission to be personally present and to address the court with his counsel, but the court will not permit him to be without counsel, and will appoint one to appear for him, though accused appears and argues the case in person. (*Post*, p. 361.)

Code cited and construed: Sec. 7224 (S.).

Constitution cited and construed: Art. 1, sec. 17.

4. CRIMINAL LAW. Judgment on appeal. Presence of accused. Accused appealing from a conviction of a felony must be present when judgment is rendered on appeal, though he has been released on bond, and only under very special circumstances will the court reverse a judgment in a felony case where accused is under bond without requiring his presence in court. (*Post*, p. 364.)

Code cited and construed: Secs. 6331, 6332, 7112 (S.).

FROM CROCKETT.

Appeal from the Circuit Court of Crockett County.
—T. E. HARWOOD, Judge.

T. C. GORDON, for appellant.

FRANK M. THOMPSON, Attorney-General, for the State.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The plaintiff in error was indicted and convicted in the circuit court of Crockett county for the crime of burning his house to obtain the insurance, and is now

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serving a term in the State penitentiary. He appealed in error to this court, but, having filed no bill of exceptions, the execution of the judgment was not stayed, and he was transported to the penitentiary in obedience to chapter 102, Acts of 1901, to enter upon the period of his servitude pending the appeal.

When the case was called for argument here the attorney-general inquired whether the court would order the prisoner to be brought from Nashville to Jackson so that he might be present at the hearing. This was considered unnecessary, and the case was proceeded with in his absence. There being, as already stated, no bill of exceptions, and no error being found on the technical record, the judgment was affirmed.

The practice in this court heretofore has been, in felony cases, to have the prisoner present; the only exception being that we have occasionally announced a judgment of reversal with a remand for a new trial where the plaintiff in error was on bond, permitting him to come in later and execute a bond or enter into a recognizance to appear at the next term of the trial court, meantime withholding the formal entry until the new obligation could be executed. Very little inconvenience has resulted from this practice as to persons under bond or recognizance, or in the case of persons in jail and transported from the counties in which they were convicted to the place where the supreme court might be sitting (Nashville, Knoxville, or Jackson), although quite an item of expense to the State in cases of the latter kind. When sitting at Nashville it is not

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very inconvenient or expensive to the State to have a prisoner brought from the penitentiary into court for trial; but when we are sitting at Knoxville or Jackson it is quite inconvenient and very expensive, to say nothing of the danger of escape, to have the prisoner, under the care of guards, transported some hundreds of miles from the penitentiary to the place of the court's sitting. Cases of this kind occurring under the operation of the act of 1901 previously cited, or when the prisoner has been convicted of one offense, has been incarcerated in the penitentiary for that, has been subsequently transferred to the trial court to stand trial for another offense, been returned to the penitentiary, and afterwards been brought out to have his case heard by the supreme court, and transported across the State, as already mentioned—these cases have brought the subject forcibly to our attention, and impressed upon us the duty of deciding whether it is essential to jurisdiction in any case that the appellant in a criminal case shall be personally present during the argument, or at the decision of his case in the appellate court.

The question has received consideration in several jurisdictions, and has, we believe, without exception, been answered in the negative.

There is no doubt that the accused must be present during his trial in the circuit court, criminal court, or other court of original criminal jurisdiction. *Percer v. State*, 118 Tenn., 765, 103 S. W., 780; *Hopt v. Utah*, 110 U. S., 574, 4 Sup. Ct., 202, 28 L. Ed., 262; *Lewis*

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v. *United States*, 146 U. S., 370, 373, 13 Sup. Ct., 136, 36 L. Ed., 1011.

It is equally clear that he need not be present in the appellate court. *Phleming v. State*, Minor (1 Ala.), 42; *State v. Overton*, 77 N. C., 485; *State v. David*, 14 S. C., 428; *Donnelly v. State*, 26 N. J. Law, 463, 471, and cases cited; *Fielden v. People*, 128 Ill., 595, 599 *et seq.*, 21 N. E., 584, and cases cited; *Schwab v. Berggren*, 143 U. S., 442, 12 Sup. Ct., 525, 36 L. Ed., 218.

Phleming v. State:

“The constitution guarantees to the accused the right of being heard by himself and counsel. It is said that he cannot be heard unless present. We are of opinion, that this guaranty applies only to the courts in which the facts are to be inquired into, and the accused to be confronted by the witnesses against him.”

State v. Overton:

The defendant had been tried in the lower court and convicted of murder, and he appealed to the supreme court of North Carolina. That court held there was no error, and ordered that its decision be certified to the trial court to the end that the latter might proceed to judgment and execution. When the defendant was called to receive judgment there, he objected that it should not be rendered against him, because he had been improperly convicted, and had been denied his constitutional right, in that he had not been present in the supreme court when his case was argued and determined. Speaking to this matter, the court said:

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“The objection is founded upon an erroneous idea of a criminal trial, and of the power and duty of this court in such case brought before it by appeal. The constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used. That is his trial. This, of course, implies that he shall have the right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court.

“Here are no ‘accusers,’ no ‘witnesses,’ and no ‘jury;’ but upon inspection of the record this court decides whether there was error in the trial, and, without rendering any judgment, orders its decision to be certified to the court below. It has never been understood, nor has it been the practice, that the defendant shall be present in this court; nor is he ever ‘convicted’ here.”

State v. David:

“At the hearing of this case, the appellant being absent, the question was raised whether his presence was necessary; the court ruled that the hearing might proceed without the presence of the prisoner. As this is a departure from the practice heretofore obtaining in this State, although not embraced in the appeal, it may not be improper for the court to state briefly the grounds of this ruling. The practice of having the

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prisoner in cases of felony present in the appellate court was because of the ancient practice and precedents in the English courts. This practice grew up in England because a prisoner indicted for felony could not at common law appear by attorney or counsel. Therefore his presence was always required in every stage of the proceedings.

“In the United States a different system prevails. In all criminal cases and in all the courts the accused is entitled to counsel. In this State he is entitled by article 1, section 13, of the constitution to be fully heard in his defense by himself or by his counsel, or by both; and, if he claimed the right to be present and be heard in his defense, he would be entitled to that privilege, but his personal presence is not necessary in this court as a condition precedent to the hearing of such questions as may be raised here by appeal.”

Donnelly v. State:

After stating the ancient English practice, substantially as in the preceding case, the court continued:

“But a totally different practice appears to have prevailed in this State upon proceedings in error. Upon as full an examination of the precedents as has been practicable since the application, we do not find a single case where upon writ of error the prisoner has been brought into court upon *habeas corpus* or has assigned errors in person.”

After referring to authorities sustaining the point, the court proceeds:

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“These cases meet one of the suggestions made by counsel upon the argument, that the prisoner is executed by virtue of the judgment of the higher court, and that he must . . . necessarily be present when the sentence is pronounced. This question, though not raised or discussed by counsel, attracted the attention and underwent the consideration of this court in the case of *State v. Fox* [25 N. J. Law], 566. It appeared then to the court that, if the prisoner was to be sentenced here, he must necessarily be present. But the judgment in error in capital cases, as in others, is simply of affirmance or reversal of the sentence pronounced upon the prisoner by the court below. By virtue of that sentence he is executed. The mandate for execution issues from the court below, not from the court of errors. The prisoner is executed by virtue of that mandate. The writ of error does not suspend its execution or impair its efficiency. . . .”

Fielden v. People:

Samuel Fielden, Michael Schwab, Albert R. Parsons, Adolph Fisher, George Engle, and Louis Ling had been tried and convicted in the criminal court of Cook county, and sentenced to be hanged for the crime of murder. A writ of error was procured from the supreme court of the State, and duly prosecuted. In the supreme court, no error being found in the proceedings of the trial court, the judgment of that court was affirmed, and a new date for the execution fixed. The judgment of affirmance contained the words “came the parties,” thus indicating the prisoners’ presence in court, when

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the judgment was rendered; but, in fact, they were not present. They were confined in the Cook county jail. A motion was made to correct this recital with a view to making the point that the judgment was void because of the absence of the prisoners. "In our opinion," said the court, "the amendment, if made, would be inconsequential, and would not affect, in the slightest degree, the rights of the parties under the judgment."

The opinion in this case sets out with more particularity than any of the others cited the reasons for the common-law rule applicable to trial courts; that the defendant might be identified by the court as the real party to be punished (Holt, 399); that he might have an opportunity to plead a pardon (3 More, 365), or move in arrest of judgment (*King v. Speke*, 3 Salk., 358); that he might have an opportunity to say any thing he could why judgment should not be pronounced against him (2 Hale's Pleas of the Crown, 401, 402); and that the example of defendants found guilty of misdemeanors of a gross and public kind might be brought up for the animadversion of the court, to the end that others might thereby be deterred from the commission of similar offenses. 1 Chitty, Cr. Law (5 Ed.), 693, star page 696.

It is obvious that none of these points of practice are essential to an appellate court, and that some of them are wholly inapplicable.

The matter of the identity of the person accused with the party before the court cannot arise, since the case

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comes up on a written or printed transcript of the record of the trial always, with the accused held in custody, or on bond or recognizance. The practice of moving in arrest of judgment is unknown in appellate courts, or of the accused being called on to say why he should not be punished. It is true that he may offer to the court, on mere motion, a pardon obtained after the judgment of the trial court, but this can be done just as effectively after judgment in the appellate court as before, and by counsel. Under such circumstances the latter court would not hesitate to set aside its judgment of affirmance. As to animadversion on the evil example referred to, this may as well be uttered in the absence of the accused as in his presence; moreover, these admonitions are more fitted to trial courts than to appellate courts. In many of the latter the opinions of the judges are merely handed down in writing. In jurisdictions like our own, where they are usually delivered orally, or read aloud from manuscript, those who hear are generally only lawyers, who, we may presume, are from their legal studies fully apprised of the nature and tendency of crimes punished by courts.

It is true that an accused not personally present in court could not be instantly aware of the judgment. Such instant knowledge, however, is not material. If present, there is nothing he could do or say to change the result. At most, he could file a petition for rehearing, within the time permitted by the rules of the court, or within such additional time as might be

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granted by the judges. Such petitions are properly filed by counsel, and accused persons should always be so represented by counsel of their own selection; if no such counsel appear, then by counsel appointed by the court to defend them. Nor is it important, as intimated in one of the cases referred to, that the accused should be present when the court appoints counsel for him. If he fail to exercise the privilege of selecting his counsel himself, he can have nothing to say to the court's selection.

Nor is it essential that the accused be present to receive the sentence or judgment of the court, whether it be in the form of a mere affirmance of the judgment of the trial court and a remand for its execution or a new judgment in the appellate court, substantially in the terms of the judgment of the trial court. The appeal in error or writ of error, as the case may be, in a felony case, places the accused under the jurisdiction of the appellate court, and personally and bodily within its power. It cannot be important whether that court by a remand restores the jurisdiction of the trial court to execute its judgment which has been affirmed, or on affirmance make the judgment its own, and thereafter execute it. Such execution may be effected in this State by an order to the marshal of the court to proceed to the jail of the county wherein the prisoner is confined, take possession of him, and transport him to the penitentiary, or such order may be issued to the sheriff of any county having him in charge or to an official of the penitentiary. This court is authorized

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by statute to issue any process which it may deem proper to effectuate its jurisdiction. Shan. Code, section 6336.

Is there anything in our constitution which forbids the practice we have indicated as permissible? Article 1, section 9, reads:

“That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself.”

A similar provision in the constitution of Illinois was held in the case last referred to (*Fielden v. People*) to apply only to trial courts. As to our constitutional provisions just quoted the soundness of the same application is manifest. There can never be any necessity for demanding in an appellate court the nature and cause of the accusation, or for giving the accused a copy. He has already had these rights accorded him in the trial court, and a copy of the accusation, be it indictment or presentment, always appears in the transcript transmitted to the appellate court. No witnesses are called or can be heard on either side in the appellate court and there is no jury, and the appellate court can never hear the trial in the county where the crime

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was committed, unless it should happen to have been committed in the county where the constitution or the laws require the court to have its regular sittings. So it is clear none of these provisions can apply to the appellate court.

All of these provisions applying incontestably, as they do, to the trial court only, it would seem that the only remaining one must have the same construction, that is, the right of the accused to be heard by himself and counsel. This is strengthened by the expression "in all criminal prosecutions;" since, as pointed out in *Fielden v. People*, supra, the trial in the appellate court is not a prosecution by the State, but a proceeding in error brought by the accused himself, through his appeal in error or writ of error, to reverse the judgment rendered against him by the trial court.

But, aside from the constitutional provision quoted, it is, no doubt, true that in order to prosecute his writ of error or appeal in error the plaintiff in error has the right to present his case to the court either in person or by counsel. The constitutional provision (article 1, section 17) guaranteeing due course of law could not be otherwise complied with. As to which method should be pursued in any given case, this must be, as the occasion arises, a matter for the judgment of the court, holding in tender consideration always the best interests of the prisoner. In some cases it might be deemed best to hear both the plaintiff in error and his counsel. Experience, however, shows that there are very few plaintiffs in error in criminal cases who

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can raise or argue points of error in an appellate court, or do themselves the slightest service in respect of such matters. We may add, however, that, in our opinion, out of its compassion for a fellow human creature in bonds, the court could rarely see its way clear to deny his request for permission to be personally present, and to address the court along with his counsel. But we do not think the court would ever be willing that he should be without counsel, or should trust to his own efforts. Counsel would be appointed by the court to appear for him, even if the plaintiff in error should appear and argue the case in person.

Further upon the subject of due course of law, we wish to refer more particularly to the case of *Schwab v. Breggren*, supra. That case, a *habeas corpus* proceeding, arose out of the judgment of the supreme court of Illinois in *Fielden v. People*, supra. Schwab sued out a writ of *habeas corpus*, in one of the Federal courts of Illinois, making the question that he had not been accorded due process of law, in that he was not present in court when the supreme court of Illinois affirmed the judgment of death against him, but was then confined in the Cook county jail. A demurrer was filed which, of course, admitted the facts averred in the petition. The demurrer was overruled, and the petition dismissed. Subsequently, when the case reached the supreme court of the United States, the judgment of the lower court was affirmed, the supreme court, after recognizing the necessity of the presence of the accused in the trial court, saying:

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“But neither reason nor public policy require that he shall be personally present pending proceedings in an appellate court, whose only function is to determine whether, in the transcript submitted to them, there appears any error of law prejudicial to the accused; especially where, as in this case, he had counsel to represent him in the court of review. We do not mean to say that the appellate court may not, under some circumstances, require his personal presence, but only that his presence is not essential to its jurisdiction to proceed with the case.”

We have a statute in this State which recognizes by its express provisions the practice of proceeding with misdemeanor cases in the supreme court in the prisoner's absence. Shan. Code, section 7224. This section provides that in all misdemeanor cases, in event of an appeal in error or writ of error, the trial court, or its judge, shall direct the clerk of the circuit court to admit the defendant to bail, in a sum prescribed by such judge or court, with sufficient sureties, for his appearance at the circuit court in which judgment was rendered against him, at the next term after the decision of the case by the supreme court, to answer the judgment of said court. The next section declares that in all such cases it is the duty of the clerk of the supreme court immediately after the decision of the case by the court to make out and certify a copy of the judgment to the clerk of the circuit court from which the case was brought.

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There is no statute regulating the practice in this regard in felony cases. The practice, however, has always been for the trial courts to take bonds or recognizances for the appearance of the prisoner at the next or pending term of the supreme court, and conditioned not to depart without the leave of this court. If no such bond or recognizance be executed in the trial court, this court, the supreme court, is authorized to take a bond or bonds in such sum or sums as it may deem proper. Shan. Code, section 7112. The court may also recommit offenders in any State case when it may appear necessary, and remand the case to the trial court, taking recognizance or bond from such defendant when the offense charged is bailable, with such security as the court may judge it right to require. Shan. Code, section 6331. And the court may cause judgment to be entered on any of these bonds or recognizances, and all others executed during the progress of the cause, whether executed, under the provisions referred to, in the trial court, or in the supreme court, or under the general provisions of law, or by lawful order of the court. Shan. Code, section 6332.

It would seem, therefore, that accused persons bonded to appear in this court must do so. This does not mean, however, that they must be present during the argument of the cause or at the decision, any more than persons in jail. This matter is within the discretion of the court. They must be present, of course, in cases where judgments are affirmed, either at the time or later, in order that actual custody may be taken

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of them, and that they may be transported to the penitentiary. In cases of reversal and a remand to the lower court for a new trial they must attend to give a bond or recognizance, unless permitted by order of the court to surrender to the sheriff of the trial court and give bond there. By what has just been said it is not meant that it is not the duty of an accused, standing on bond or recognizance, to attend court pursuant to the terms of such bond or recognizance, or that the court could not have him called out at any time it might deem the interests of justice should require, but simply that the presence of the accused is not essential to the jurisdiction of the court when hearing or deciding the case. We may add that it is not probable that the court will affirm the judgment in any felony case when accused is under bond without having him present in court; since, knowing the adverse judgment rendered in his absence, he would be tempted to flee, and might yield to that temptation. It is also true that the court would rarely, and only under very special circumstances, reverse a judgment in a felony case when the accused is under bond, without requiring his presence in court; since, if such practice should become general, accused persons on bond or recognizance summoned to hear judgment would at once infer an unfavorable result, and so be prompted to breach the bond and escape. We feel sure that reasons like this underlie the just discrimination made by the legislature between misdemeanor and felony cases in authorizing the taking of bonds in the former class conditioned to ap-

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pear at the term of the trial court next succeeding a term of the supreme court at which the case had been determined, and making no such provision for felony cases.

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FOURTH NAT. BANK OF NASHVILLE v. E. B. STAHLMAN
*et ux.**SAME v. NASHVILLE BANNER PUBLISHING COMPANY, *et al.*

(Jackson. April Term, 1915.)

1. BANKS AND BANKING. National banks. Stock purchasing contract.

A contract between a national bank and the promoter of a building corporation, whereby the promoter was to purchase from the bank stock subscribed for by it, was not *ultra vires* of the bank, the stock having been taken by the bank as part of a transaction for the renting of banking quarters. (*Post*, p. 379.)

2. BANKS AND BANKING. National banks. Powers. Purchase of stock.

Under Rev. St. U. S., sec. 5137 (U. S. Comp. St. 1913, sec. 9674), providing that a national bank may purchase and hold real estate necessary for its immediate accommodation in the transaction of its business, and section 5136 (section 9661), providing that such bank may exercise all incidental powers necessary to carry on the business, a national bank may acquire and hold stock in a building corporation as part of a transaction for renting desirable banking quarters; good faith being the test whether such investment is legitimate. (*Post*, p. 380.)

Cases cited and approved: California Bank v. Kennedy, 167 U. S., 362; Mapes v. Scott, 94 Ill., 379; Talbot v. First Nat. Bank, 185 U. S., 172; Portland Nat. Bank v. Scott, 20 Or., 421; Wingert

*This cause was heard at the last term of the Supreme Court at Nashville, 1914, and was taken under advisement by the Court and decree rendered at Jackson, Tenn., during the April term, 1915, to be entered at Nashville under the provisions of the Act of 1915, same being filed with the clerk of the court at Nashville, Tenn., on July 6, 1915. Chief Justice Neil incompetent on account of relationship.—Editor.

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v. First Nat. Bank, 175 Fed., 739; Id., 223 U. S., 670; Weeks v. Int. Trust Co., 60 C. C. A., 236; Farmers' Dep. Nat. Bank v. West Pa. Fuel Co., 215 Pa., 115; Union Nat. Bank v. Matthews, 98 U. S., 621; Marble Co. v. Harvey, 92 Tenn., 115; First Nat. Bank of Concord v. Hawkins, 174 U. S., 564; First Nat. Bank v. Converse, 200 U. S., 425; Merchants' Nat. Bank v. Wehrmann, 202 U. S., 295.

3. BANKS AND BANKING. National banks. Power to purchase stock.

While it is unlawful for a national bank to deal in stocks, it may loan money on shares of other corporations, and in order to collect the debt may purchase the stock, or may acquire it to protect itself against loss in compromising a doubtful liability. (*Post*, p. 384.)

Cases cited and approved: First Nat. Bank v. Exchange Nat. Bank, 92 U. S., 122; California Bank v. Kennedy, 167 U. S., 362; Germania Nat. Bank v. Receiver, 99 U. S., 629; National Bank v. Matthews, 98 U. S., 621.

4. CONTRACTS. Consideration. Mutual promises.

A contract between a national bank and the promoter of a building corporation, whereby the promoter agreed to purchase from the bank building corporation stock held by it, in consideration that the bank would pay its subscription for the stock, was not void as being unilateral; the obligation to sell and buy being mutual. (*Post*, p. 388.)

5. CORPORATIONS. Stock. Contract for purchase.

An agreement between a bank and the promoter of a building corporation, whereby the latter agreed to purchase certain shares of stock owned by the bank, the bank reserving an option to sell the stock at any time to other persons, but providing that the promoter was to have the option to buy such stock at par and accumulated dividends at any time before the bank sold it to others, and providing for thirty days' notice to the promoter before selling, is an absolute and unconditional agreement to sell, and not a mere option. (*Post*, p. 388.)

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6. CORPORATIONS. Transfer of stock. Unpaid dividends.

A contract between a bank and the promoter of a building corporation, whereby the promoter agreed to buy certain guaranteed six per cent. cumulative preferred stock in the building corporation from the bank, and that if any dividends upon such stock remained unpaid at the time of purchase the promoter was to pay the accumulated dividends at the rate of six per cent. per annum, bears interest as upon a loan, and the promoter is liable for guaranteed dividends unpaid by the corporation, although not earned nor declared by it. (*Post*, p. 390.)

7. ACCOUNT STATED. Omission of item.

Where a bank rendered a statement containing separate items of indebtedness in response to a debtor's request, and the latter thereupon made a tender of the amount stated, that the bank had erroneously omitted a particular item from the statement did not estop it from suing thereon; no one having been prejudiced by the making of such statement. (*Post*, p. 392.)

8. PLEDGES. Release of securities. Tender.

Where a creditor holds securities as collateral for several items of indebtedness, a tender by the debtor which does not include all such items does not operate to release the securities. (*Post*, p. 393.)

9. BILLS AND NOTES. Release of attorney's fees. Effect of tender.

A tender by a debtor of full payment of a note, constituting one of several items of indebtedness, was sufficient to exonerate him from the payment of attorney's fees stipulated therein; the note not being disputed. (*Post*, p. 393.)

10. PLEDGES. Security for loans. Debts secured. "Obligation."

Collateral deposited with a bank to secure a promissory note, written on the blank form furnished by the bank and reciting that such collateral "shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation.

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All such securities in their hands shall stand as one general continuing security for the whole of such obligations, so that the deficiency on any one shall be made good from the collateral upon the rest"—may be held by the bank to secure the performance of a contract previously executed, whereby the pledgor agreed to purchase certain corporate stock from the bank, such contract constituting an "obligation" within the recitals of the note. (*Post*, p. 395.)

Case cited and approved: *Bank v. Wood*, 125 Tenn., 16.

Cases cited and distinguished: *Gillet v. Bank of America*, 160 N. Y., 555; *Cocke v. Hoffman*, 73 Tenn., 112; *Loyd v. Lynchburg Bank*, 86 Va., 690; *First Nat. Bank of Omaha v. Illinois Trust & Savings Bank (C. C.)*, 84 Fed., 34; *Brown v. James*, 80 Neb., 475; *Torrance v. Third Nat. Bank of Pittsburg*, 210 Fed., 806; *Harris v. Bank of Franklin*, 77 Md., 423; *Hallowell v. Blackstone Nat. Bank*, 154 Mass., 359; *Norfleet v. Insurance Co.*, 160 N. C., 329; *Milling Co. v. Steverson*, 161 N. C., 512; *Bank v. Lumber Co. (C. C.)*, 194 Fed., 732; *Wilson v. Carothers (Ky.)*, 43 S. W., 684; *Hanover Nat. Bank v. Brown*, 53 S. W., 206; *Gillet v. Bank of America*, 160 N. Y., 555.

11. PLEDGES. Security for loans. Application of collateral.

Where the language of a note made to a bank by its customer, under which collateral is deposited as security, is unambiguous, and plainly shows that the parties contemplated that such collateral might be held as security for all other legal obligations or liabilities, the contract will be so construed, it being only where the language is ambiguous and the meaning doubtful that its provisions will be limited to a restricted class of obligations presumed to have been in the contemplation of the parties when the contract was made. (*Post*, p. 410.)

12. PLEDGES. Security for loans. Application of collateral.

Where collateral has been deposited with a bank to secure a promissory note, reciting that the collateral shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of such obligation, such language will not be construed to mean

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that another bank, to which the holder might transfer the note with its collaterals, can hold them as security for other debts which the maker might have created with such other bank, since such other debts would not have been in the contemplation of the parties when the loan was made. (*Post*, p. 411.)

13. PLEDGES. Application of collateral to other debts. Surety's right of subrogation.

Where collateral has been deposited with a bank to secure a promissory note, reciting that such collateral may be applied to all other obligations of the maker to the bank, a surety or indorser who pays such note will be subrogated to the place of the bank as to such collaterals, which right may not be defeated by the application of the collaterals to any other debts owing by the maker to the bank. (*Post*, p. 412.)

Cases cited and approved: *Bank v. Wood*, 125 Tenn., 16; *Hallowell v. Blackstone Nat. Bank*, 154 Mass., 359; *Wilson v. Carothers* (Ky.), 43 S. W., 684; *First Nat. Bank of Omaha v. Illinois Trust & Savings Bank* (C. C.), 84 Fed., 34; *Gillet v. Bank of America*, 160 N. Y., 549; *Titcomb v. McAllister*, 81 Me., 399.

Cases cited and distinguished: *Richardson v. Washington Bank*, 3 Metc. (Mass.), 536; *Fall River Nat. Bank v. Slade*, 153 Mass., 415.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—JNO. ALLISON, Chancellor.

P. D. MADDIN and JOHN J. VERTREES, for Fourth Nat. Bank.

E. A. PRICE, H. H. BARR, and PITTS & McCONNICO, for Stahlman and Banner Pub. Co.

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MR. JUSTICE FANCHER delivered the opinion of the Court.

These two suits were tried together upon the same facts and involving the following questions:

The Fourth National Bank of Nashville, Tennessee, was a highly prosperous and growing concern. It owned its own banking house, situated upon Third avenue north in the city of Nashville, and a short distance south of Union street, but this house was not adequate to the increasing demands made upon it for banking facilities. This location was in the center of the financial district of the city, and was considered a very desirable location, but there was another lot on the corner of Third avenue and Union street, owned by the defendant E. B. Stahlman, which was considered a better location for a banking business than that owned by the bank. This corner lot was an old banking site which had been used for such purposes since before the Civil War. The Fourth National Bank at first had in view the construction of a banking building upon its own lot, and appointed a committee as early as 1902 to consider the question of remodeling the old building, or the construction of a new building in order to secure a larger banking room and more commodious quarters. This committee visited a number of cities in the North and East and examined up-to-date banking buildings. The bank considered the question of purchasing adjacent lots of land in order to give it additional room for a larger building. These matters were

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considered by the committee and the officers of the bank, and postponed from time to time until in the year 1905.

In that year, Maj. E. B. Stahlman approached the bank on the subject of acquiring the adjacent real estate belonging to the Fourth National Bank and other adjacent lands to his corner lot on Union street and Third avenue, and suggested tearing down the old buildings and erecting a modern twelve-story office building on the corner, with large and elegant banking room immediately on the corner on the first floor of the building, with vaults and other necessary rooms to be occupied by the bank under a long lease. He offered to promote a corporation for this purpose, and suggested that the bank convey its lands to the corporation at the price of \$58,000 to be paid for in the preferred stock of the building corporation, and that the bank would also loan \$45,000 for the purpose of assisting in the construction of the building upon long-time notes. He desired this \$45,000 to be secured by the stock in the corporation. The bank refused to make the loan upon the terms desired, because it was not according to its custom of business. Major Stahlman next proposed that the bank subscribe for this \$45,000 of stock, and he would buy the stock back from it at stated intervals, and in order to guarantee that he would carry out the contract, he would give security other than the stock itself.

The building contemplated a total investment of about \$875,000, and it was suggested that the preferred

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stock should amount to \$400,000, and that common stock would be issued to an amount to be agreed upon later. On April 12, 1905, these suggestions were embodied in a contract signed and executed by Major Stahlman, as promoter, and the bank, and the agreement was that the stock to be taken by the bank should be preferred, and providing a guaranteed cumulative dividend of six per cent. per annum, the dividends to begin when the deed was made for the real estate, as to the stock for the purchase of the lots, and to begin when the money should be paid by the bank, as to the \$45,000 of subscription stock. It was provided that the bank should have certain desirable quarters on the first floor and in the basement at a rental of \$12,000 per annum, for a period of ten years and renewable at that price for another ten years. For other periods extending the whole time of the right to lease to fifty years, the bank should have the option and the terms to be agreed upon or fixed by arbitration.

The promoter agreed that he would bring out a corporation for these purposes, and that it would expend not less than \$40,000, nor more than \$45,000 for vaults, railings, counters, desks, marble fixtures, decorations of ceiling and walls, etc., according to plans to be selected by the bank. The banking room was not to be less than 4,500 square feet in the clear, and also in connection with the banking room there would be constructed and furnished 3,000 square feet in the basement, to be arranged, subdivided, and equipped to the best needs and convenience of the bank.

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It was further stipulated that the bank should have the right to transfer and assign its lease and renewals thereof, but that the said building corporation to be brought out should not rent any space in the building to any other bank, person, firm or corporation doing a banking business, and giving the Fourth National Bank exclusive banking quarters. A time limit within which these things should be done was agreed upon. This time limit was further extended on July 20, 1905, and further stipulations concerning the contract were then entered into. On April 5, 1906, the final agreement was concluded, reciting these former agreements, making it the final contract between the parties.

Mollie T. Stahlman, the wife of E. B. Stahlman, joined in this final contract, and it was provided that, in consideration of the payment of the subscription of the Fourth National Bank of said \$45,000 of capital stock, that the said Stahlman and wife would buy from the bank, and the bank agreed to sell to the said Stahlman and wife the said \$45,000 of capital stock at par or face value thereof, to be taken and paid for at intervals from December 1, 1909, to December 1, 1912, and provided, further, that if any dividends upon said stock remained unpaid at the time of said purchases, Stahlman and wife were to pay the accumulated dividends, which were to be at the rate of six per cent per annum, or one-half per cent. per month. Said E. B. Stahlman and wife were to have the right at any time to take up and pay for the stock at the price stipulated, and they deposited with the bank insurance policies on the

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life of E. B. Stahlman, legally assigned to the bank, to an amount equal to \$45,000.

This building corporation had, in the meantime, been organized as the Mecklenburg Real Estate Company, a conveyance had been executed by the bank prior to this final agreement, conveying the real estate to the Mecklenburg Company, and the building was then in process of erection.

The bank reserved the option to sell and dispose of the \$45,000 of stock subscribed for by it at any time to any persons, but it was agreed that Stahlman and wife, or either of them, should have the option to buy said stock at par and accumulated dividends at any time or times before the bank sold it to others, and in order that this might be done, at least thirty days notice of the desire of the bank to sell the stock or any part thereof shall be given Stahlman and wife before the bank shall have the right to sell to others.

Is the contract of Stahlman and wife of April 5, 1906, under the circumstances of this case, to buy from the bank this \$45,000 of stock for which the bank had subscribed, enforceable? This is the leading issue in the litigation. It is insisted by the defendants that a national bank cannot take stock in another corporation because it is against public policy, *ultra vires* the powers of the bank, and the contract, still being executory, cannot be enforced; also that the contract for the purchase of the stock by Stahlman is unenforceable for want of a valuable consideration; that the so-called agreement to purchase was a mere option, with

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no corresponding obligation on the part of the bank to sell to Stahlman; and if enforceable at all, accumulated unpaid dividends, or interest, cannot be recovered as upon a loan, as the bank contends; that upon any construction of the rights and obligations of the parties, the provisions in the contract for security are exclusive, and that collaterals held by the bank on other loans cannot be retained to cover this liability.

Major Stahlman owed the bank a number of loans made to him and the Banner Publishing Company, and others for whom he was security, and on one of these notes of \$24,400, the bank held as collateral security a block of one hundred shares of stock in the Banner Publishing Company said to be very valuable. These various notes held by the bank contained general printed stipulations that the pledged securities—

“shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation. All such securities in their hands shall stand as one general continuing security for the whole of such obligations so that the deficiency on any one shall be made good from the collateral from the rest.”

The position of the defendant is that this collateral security agreement will not be construed as applying to secure contracts or obligations different in nature from those for which they were placed, but only those of like kind; that is, on promissory notes or purely banking obligations.

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The suits originally involved a number of questions, many of which are now eliminated. A short time before the suits were brought the bank made a call on Major Stahlman to pay, by a given day, all his obligations, including large bank loans, and the stock purchase debt with dividends thereon, which had not been paid by the Mecklenburg Company.

Major Stahlman thereupon demanded an itemized statement of all these debts, which was furnished by the bank, and he then, on the date demanded by the bank, tendered to the bank the full amount claimed, except the amount claimed under the \$45,000 stock purchase agreement, and demanded the surrender to him of all collaterals held on the note for \$24,400, which tender the bank refused, on the ground that it did not include the amount under the stock purchase agreement.

After the suits, however, Major Stahlman did pay, either to the bank direct or into court, all these bank debts, leaving only an item of interest which had been omitted in the statement by the bank and the stock purchase debt unpaid.

The chancellor held that Major Stahlman was liable on his contract to purchase the stock and for dividends thereon, and that the complainant was entitled to hold all collaterals, decreed a sale of them to pay the judgment, and for the costs of the case. He released Mrs. Stahlman on a plea of coverture, and held that the bank was not entitled to recover attorney's fees on a note of \$24,400, as provided on its face, on the ground

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that Major Stahlman tendered payment in full on this note. Judgment was had on all these loans due the bank, to be credited by the money in court under the tenders.

Defendant Stahlman appealed to this court.

We will now consider the stock purchase agreement of April 5, 1906.

It is urged by defendant that the bank actively aided in the promotion of the Mecklenburg Company, dictated its affairs, had placed on its board of directors and among its officials numbers of the bank officials and patrons; that its cashier's letter was attached to the prospectus, and it otherwise actively secured subscriptions to stock; that its own stockholders to a large number became stockholders in the building concern; that it dictated a limit on the issue of common stock; required Stahlman to give his proxy to the bank to vote \$100,000 of the common stock for a period of five years, and that this was not a good-faith transaction by the bank; that it had ample real estate upon which to build a structure of its own, and various circumstances are urged why it was not necessary to take stock in the Mecklenburg Real Estate Company.

The bank had a capital of \$600,000 and its undivided profits and surplus amounted to about \$528,000. It could have built on its own property and thus secured a house adequate to its needs for about \$225,000. But the officials of the bank show that such a building would have depreciated in value as time progressed more than the lot would have become enhanced, and that

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the economical and businesslike thing to do was to do as they did, secure a more suitable location in a large and handsome office building at a smaller outlay of cash.

The bank officials had something to say about how the building should be constructed and the contemplated cost and use of same, but no harm was done any one in this. The fact that several persons interested in the bank were also interested to a small extent in the Stahlman Building is within itself no evil.

The proof is abundant that it was not the purpose of the bank to promote a sky scraper building, or to own and control stock in such a structure, further than was absolutely necessary and in order to procure an adequate and suitable banking home, commensurate with the growing needs of this thriving institution, situated, as it was, in a growing city. Its paramount purpose in selling the ground and in taking in pay therefor stock in the Mecklenburg Real Estate Company and subscribing the stock of \$45,000 in this company was to avoid expensive building, preserve its large surplus, and to secure for a term of years the use of the handsome and commodious banking quarters provided for in the contract.

The question arises, Was the purchase of this \$45,000 of Mecklenburg stock by the bank so far in excess of the real powers of a national bank as to put it without the law and forbid its enforcement of the contract to dispose of this stock?

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National banks are organized under federal statutes and controlled thereby, and this is a federal question, to be determined under the decisions of the federal courts. *California Bank v. Kennedy*, 167 U. S., 362, 17 Sup. Ct., 831, 42 L. Ed., 198; *Mapes v. Scott*, 94 Ill. 379, 62 L. R. A., 536, note, 12; *Talbot v. First National Bank*, 185 U. S., 172, 22 Sup. Ct., 612, 46 L. Ed., 857; *Portland Nat. Bank v. Scott*, 20 Or., 421, 26 Pac., 276.

The federal statute provides that a national bank:

(1) May purchase and hold such real estate as is necessary for its immediate accommodation in the transaction of its business (R. S., section 5137); and

(2) May exercise all such incidental powers as shall be necessary to carry on the business, etc. (R. S., section 5136).

A leading federal case touching this question is *Brown v. Schlier*, 118 Fed., 981, 55 C. C. A., 475. A national bank in Denver leased a lot from Schlier on which to erect a four-story building and to cost not less than \$100,000, the building to become the property of Schlier. The bank agreed to pay an annual rent of \$13,975. The building was to contain banking quarters, and the other parts of the building were to be used as offices and rented out by the bank. The term of the lease was for ninety-nine years with a right to renew for fifty years. The bank erected a building costing \$305,000 though its capital stock was but \$300,000.

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Upon litigation involving the question as to whether the lease was *ultra vires*, the court of appeals (eighth circuit) said:

“That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the language of the statute, and we perceive no reason why it may not likewise lease property for a term of years, and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the National Bank Act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined.”

Though the lot was leased for one hundred years to erect a larger house than the bank could use, and for the purpose of renting most of it to tenants for office

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purposes, and did erect a building costing more than the capital stock of the bank, it was not *ultra vires*, because it was a question of a good faith transaction, in which the bank secured a desirable banking house and incidentally so constructed the building as to make it of profit to the bank. That case was taken to the supreme court of the United States, where this holding was not disturbed, though the case was there disposed of on another proposition.

The case of *Brown v. Schlier* is referred to, and the principles there decided adhered to by other courts. It is well settled that a national bank has power to lease or purchase real estate for the purpose of obtaining good banking quarters when the transaction is in good faith and solely for that purpose. If a national bank makes an unauthorized purchase of real estate, it is held that the federal government alone can object. U. S. Rev. Stats., secs. 5136, 5137; *Brown v. Schlier*, 118 Fed., 981, 55 C. C. A., 475; Id., 194 U. S., 18, 24 Sup. Ct., 558, 48 L. Ed., 857; *Wingert v. First Nat. Bank*, 175 Fed., 739, 99 C. C. A., 315; Id., 223 U. S., 670, 32 Sup. Ct., 391, 56 L. Ed., 605; *Weeks v. Int. Trust Co.*, 60 C. C. A., 236, 125 Fed., 370; 3 Rul. Case Law, sec. 57; 3 Michie, Banks and Banking, pages 1983, 1992; *Farmers' Dep. National Bank v. West. Pa. Fuel Company*, 215 Pa., 115, 64 Atl., 374, 114 Am. St. Rep., 949; *Union Nat. Bank v. Matthews*, 98 U. S., 621, 25 L. Ed., 188.

The federal courts have given a broad and liberal interpretation to the National Banking Act. Though

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the act limits the holding of real estate to such "as shall be necessary for its immediate accommodation in the transaction of its business" yet when there is no ulterior purpose, the directors and officials are given latitude in determining the question.

It is not objectionable that a bank uses its necessary real estate in such way as to put it to the best use possible, consistent with good business judgment.

The proposition is undisputed that one corporation cannot invest its money in the stocks of another corporation, as a general proposition, but this is on the ground that it is unlawful as tending toward monopoly, or as being speculative and outside the scope and purpose of its organization, and not permitted as a matter of public policy. *Marble Co. v. Harvey*, 92 Tenn., 115; *California Bank v. Kennedy*, 167 U. S., 362, 17 Sup. Ct., 831, 42 L. Ed., 198; *First Nat. Bank of Concord v. Hawkins*, 174 U. S., 564, 19 Sup. Ct., 739, 43 L. Ed., 1007; *First Nat. Bank v. Converse*, 200 U. S., 425, 26 Sup. Ct., 306, 50 L. Ed., 537; *Merchants' Nat. Bank v. Wehrmann*, 202 U. S., 295, 26 Sup. Ct., 613, 50 L. Ed., 1036.

That it is unlawful for a national bank to deal in stocks will not be disputed. This, while not prohibited by the national banking laws in express terms, nevertheless the prohibition is implied from a failure to grant the power. *First Nat. Bank v. Exchange Nat. Bank*, 92 U. S., 122, 128, 23 L. Ed., 679; *California Bank v. Kennedy*, 167 U. S., 362, 17 Sup. Ct., 831, 42 L. Ed., 198.

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A national bank may loan money on shares of other corporations and in order to collect its debt purchase the stock, or it may acquire such stock in protecting itself against loss in compromising a doubtful liability. *Germania Nat. Bank v. Receiver*, 99 U. S., 629, 25 L. Ed., 448; *First Nat. Bank v. Exchange Bank*, 92 U. S., 122, 23 L. Ed., 679.

So, after all, it is a question of good faith in determining whether a national bank has made an improper investment, and whether the investment was in pursuance of its proper and legitimate banking operations under the limitations imposed by the federal laws.

The object of the restrictions on a national bank to hold real estate or to become interested therein are to keep the capital of the bank flowing in daily channels of commerce; to deter it from engaging in hazardous real estate speculations; and to prevent the accumulations of large masses of such property in its hands to be held as it were in mortmain. The intent, not the letter of the statute, constitutes the law. *National Bank v. Matthews*, 98 U. S., 621, 25 L. Ed., 188.

The bank could have built an office building in order to provide a banking home; why could it not effect the same purpose by expending a small fraction of the necessary money, paying a reasonable rental thereafter? Suppose it had built the entire structure. It appears that the investment has not paid dividends, and the stock is quoted at only about fifty cents on the market. It did a more businesslike thing. It conserved its resources for doing a banking business instead of

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embarking in a course of extravagant building. Did the provision that Stahlman should repurchase the \$45,000 of stock render the proposition odious to a sense of the legitimate scope of the undertaking? Did it not rather tend less toward monopoly and bad public policy to provide a plan by which this stock should be merely taken for the time being in order to enable Major Stahlman to construct the building and then at a later period relieve the bank of the ownership?

Granting that appellant is correct in his position that a bank cannot acquire stock in other corporations for other than those legitimate purposes connected with the prosecution of its strictly banking business, yet a reasonable interpretation of that principle must be had. This position is based upon the idea that this purchase of stock in the Mecklenburg Company was in aid of a pure promotion scheme and in order to control and dictate the affairs of that company. The premise is not well founded. The fact was not that way. The principles contended for are wise when applied to the reasons to be attained. But we must not lose sight of the reason back of the law. The restriction sought to be invoked here has its inception as a preventive of monopoly and other grave dangers. One railroad cannot purchase stock in a competing line because the tendency is toward monopoly. A bank is not permitted to purchase stock in another bank because it may tend toward monopoly. A national bank cannot buy real estate not needed in its banking business because the statute creating it has not permitted, on

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grounds of public policy, so as to confine its operations within the channels so much needed in the world of finance, and to render it at all times a purely banking institution. No reason has been suggested, and we believe none can be, why a national bank should not be permitted to own a small minority of stock in a building concern in order that it may better its own condition and render it a greater institution for the purposes of its creation. The reasons back of those cases cited by appellants, holding the acts of banks and other institutions *ultra vires* are wholly wanting. This stock was taken as a business measure to get the best banking house possible, in the most reasonable way, as seen by its officials.

If a national bank can buy expensive real estate in a banking district where real estate is costly, and then in order to so use its property as to make it a paying proposition instead of a losing one, as it can clearly do under the well-settled federal authorities, we see no reason why its officials may not be permitted a reasonable discretion in doing a lesser act, to take reasonable stock to get a desirable banking home. If it may build or lease a structure for that purpose, why may it not take a smaller interest, such as undivided interest, or subscribe for stock in order to reach the same result?

We therefore conclude that the chancellor did not err in holding that the contract of Stahlman to purchase this \$45,000 of Mecklenberg stock was not *ultra vires* the bank, illegal, against public policy, void, and unenforceable.

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This disposes of the first assignment of error.

The second assignment of error raises the question as to whether there was any legal and valid consideration to said stock purchase contract. Defendant says that the only consideration is recited on the face of that contract, viz., that complainant bank would pay its subscription to the Mecklenburg Real Estate Company for the stock theretofore made by it. It is said this is no consideration, because if its agreement to take this stock was not void, it was simply an agreement to pay its own obligation to the corporation, and that this could be no consideration moving between the bank and Major Stahlman. The contract recites the consideration as above stated, but it is very apparent that this was not the only consideration. The obligation was mutual that the bank would sell and Stahlman would buy at par, with accumulated dividends added. So it may be more correctly said that the real moving consideration was not only that Major Stahlman was willing to purchase the stock if the bank would subscribe and pay the building corporation he was promoting therefor, but the agreement of Major Stahlman to purchase was a consideration for the agreement of the bank to sell. This assignment is therefore overruled.

The third assignment of error is that the stock purchase contract was not an absolute agreement to sell the stock at the prices and times stated therein, but only an option to defendant and his wife to take it at the prices and times stated in the event complainant bank did not, in the meantime, dispose of it to others.

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The facts in regard to this agreement are stated above. This was not a mere option to sell, but an unconditional agreement upon the part of defendant Stahlman and wife to buy from the Fourth National Bank the said \$45,000 of stock, and they were to take and pay for the same, one hundred shares of the par value of \$10,000 on December 1, 1909, another one hundred shares December 1, 1910, one hundred shares December 1, 1911, and one hundred and fifty shares December 1, 1912. It is stated in the contract that it is the desire of E. B. Stahlman and wife to buy said stock from the bank. The bank reserves in the agreement an option to sell this stock if it so desires at any time or times to other persons, and thereupon, if all of same should be sold so that the claims of the said bank against E. B. Stahlman and wife were fully paid, that the bank would cancel and surrender this agreement, but that option was a conditional one because it was further provided that Stahlman and wife, or either of them, should have the option to buy said stock at par and accumulated dividends at any time or times before the bank sells it to others, and that at least thirty days' notice of the desire of the bank to sell said stock, or any part thereof, should be given Stahlman and wife, or either of them, of such desire before the bank should have the right to sell said stock to others. It was therefore an unconditional promise upon the part of Stahlman to purchase and an unconditional promise upon the part of the bank, to sell. The bank did have

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the right to sell to others if Stahlman did not buy, but this option gave Stahlman preference at all times, and in case the bank did not sell to others, which it has not done, the agreement of Stahlman was obligatory and bound him unconditionally to purchase the stock. This unconditional agreement upon his part to buy cannot be called an option. It was somewhat of the nature of a guaranty upon his part that the bank should not lose anything on the Mecklenburg stock, but Stahlman and wife stood ready to purchase the stock at stated intervals. This assignment is therefore not well taken.

The fourth assignment of error is that this stock purchase contract, if valid and enforceable, should not bear interest as upon a loan, but provides that dividends unpaid shall be included, and inasmuch as no dividends were earned, none can be recovered.

This is not a fair construction of the agreement. It is provided in the contract that this is guaranteed six per cent. cumulative preferred capital stock, and that if any dividend upon said stock remains unpaid at the time of said purchases to be made by Stahlman and wife, they will also pay the accumulative dividends upon the stock represented by each of said purchases. As long as the six per cent. dividends which this stock should bear were unpaid by the company, it was the obligation of Stahlman to pay same to the bank. It was the plain meaning that the dividends upon said stock remaining unpaid did not refer to only such dividends as the company might declare, but it was guar-

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anted stock, and was cumulative, so that the obligation of Stahlman and wife was to take care of any dividends unpaid by the company, making it in the nature of a loan to Stahlman and wife.

The fifth assignment of error is that the chancellor erred in not holding that the provisions of said alleged contract of April 5, 1906, for its own security, were exclusive, and that the bank could not hold or retain other choses in action or property of defendant for its security. This involves the question made in the sixth assignment of error, raising the point whether the pledge contained in the note of defendant of April 10, 1911, for \$24,400, of the shares of stock therein mentioned, extended to and entitled the bank to hold said stock for the security of the stock purchase claim of \$45,000.

The eighth and ninth assignments involve the sufficiency of the tender made by Major Stahlman on July 31, 1911, just before the bill in this case was filed, and whether the same was kept good pending the litigation. These assignments take the position that the tender, being good, operated to discharge the collateral held by the bank on the loan. It is argued that the bank did not object to the tender as made, except on the ground that it did not include the stock purchase claim of \$45,000. If the bank was entitled to retain all this collateral, then the tender was not sufficient to release the same.

Therefore the fifth, sixth, eighth, and ninth assignments of error depend for their solution on whether

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the collaterals held to secure the \$24,400 note were likewise applicable to the payment of the stock purchase obligation. After all other matters arising in this cause had been determined by the court, only four members sitting, Chief Justice NEILL being incompetent by reason of relationship to one of the parties, the court by the chief justice, requested Governor Rye to appoint another justice to sit in the further determination of the cause, whereupon the governor appointed Hon. W. C. Caldwell, a former member of this court, to act in the place of the chief justice, and the cause was again argued by attorneys on this question and taken under further advisement, the result of which is that the court is of opinion that the collaterals to secure the \$24,400 note were, under the contract which is a part of that note, a further security for the payment of the stock purchase obligation, and these assignments, numbers 5, 6, 8, and 9, are therefore overruled.

The views of the court touching this proposition are elaborated and treated in an opinion prepared by Mr. Justice CALDWELL, and which is filed herewith.

The seventh assignment of error is that the chancellor failed to hold and decree that complainant bank was estopped from claiming against defendant Stahlman, as indorser for Morton-Scott-Robertson Company, any more than the sum of \$3,851.24, rendered by complainant to defendant on July 29, 1911, as the balance of said debt in response to defendant's request for a statement, including interest to July 31, 1911,

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of all indebtedness to the bank for which it claimed the right to hold the collaterals mentioned in his note for \$24,400, and in failing to credit on said balance of \$3,851.24 after July 31, 1911, the collections, thereafter made by complainant bank from said principal debtor on February 14, 1914, of \$1,649.07.

In reality this assignment as to the Morton-Scott-Robertson Company debt involves nothing more than a question of estoppel. The credit of \$1,649.07 referred to in the assignment of error was allowed in the decree of the chancellor, and there is no ground for objection on that item. The bank had rendered a statement to Major Stahlman which erroneously omitted an item of interest, and the tender made thereupon was only for the amount stated by the bank. While this was a good tender so far as the amount was concerned, it was not an estoppel against the bank that will preclude it. The mistake will be corrected, as no one has been prejudiced by the statement and no element of estoppel can arise.

As regards the legality of the tender made, it was not a valid and binding tender, because it did not include the stock purchase debt, and thus did not release the securities held by the bank, but under all the circumstances of the case, in view of the dispute as to the legal effect of the stock purchase contract, we think the offer of Major Stahlman to pay the \$24,400 note was sufficient to exonerate him from having to pay the bank's attorney's fees, as stipulated in this note. There was in reality no litigation as to this item, and, the

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main fight being over the stock purchase contract, we think, in equity, the chancellor met the merits when he refused to allow attorney's fees on this note. The assignment by the bank on this point will therefore be overruled.

The debt of the Banner Publishing Company was paid prior to the bringing of these suits. The suit against the Banner Publishing Company does not now involve any live issue. It was originally to have the Banner Publishing Company stock transferred to the bank in order that it might collect the dividends. Evidently the chancellor's decree omitted any action on that phase of the litigation because it had become immaterial at that time.

The final decree found the total indebtedness of defendant to the complainant on June 1, 1914, to be \$98,745.67, to be credited with the sum paid into court January 9, 1912, which was \$28,336.64, and the accumulated interest thereon, leaving the amount to be recovered and for which the collaterals are liable, \$66,407.15. He ordered the collaterals to be sold unless the amount recovered, including costs, should be paid by September 1, 1914, giving three months within which to pay.

The decree of the chancellor is, in all things, affirmed, and the case will be remanded in order that the decree may be carried out.

MR. SPECIAL JUSTICE CALDWELL delivered a concurring opinion as follows:

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The controlling question in this litigation at its present stage, that submitted for reargument, is whether the bank is entitled to hold, as security for a pre-existing debt of E. B. Stahlman and wife, collaterals pledged by him with his personal note to the bank for borrowed money.

It is usual for borrowers of money from banks to secure their loan notes by the pledge of collaterals; and it is allowable in law for the parties to agree at the time that the collaterals so pledged may be held also for the payment of pre-existing debts and subsequent debts, either or both. Jones on Collateral Security, sec. 358.

The scope of the pledge will not be extended beyond that intended by the pledgor; and, if it be written in a blank furnished by the bank, any doubt that may arise as to the proper interpretation of the language used will be resolved in favor of the customer. *Bank v. Wood*, 125 Tenn., 16, 140 S. W., 31.

"The reason for the rule that the language of an instrument is to be construed against the person who proposes it rather than against the person who is invited to accept it is that men are supposed to take care of themselves, and that he who chooses the words by which a right is given ought to be held to a strict interpretation of them, rather than he who only accepts them." *Gillet v. Bank of America*, 160 N. Y., 555, 55 N. E., 292.

On the fifth day of April, 1906, E. B. Stahlman and wife, Mollie T. Stahlman, entered into a written con-

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tract with the Fourth National Bank of Nashville, Tenn., whereby they agreed to purchase from the bank and the bank agreed to sell to them four hundred and fifty shares of the preferred capital stock of the Mecklenburg Real Estate Company, at the par value of \$45,000, payable in four installments: \$10,000 December 1, 1909; \$10,000 December 1, 1910; \$10,000 December 1, 1911; \$15,000 December 1, 1912.

The bank retained the possession of the stock and received, as collateral security for the price of the stock, five insurance policies on the life of E. B. Stahlman, those policies aggregating \$45,000.

After that E. B. Stahlman made a note to the bank on one of its blank forms for borrowed money, in the terms and figures following, viz.:

“\$24,400.00 Nashville, Tenn., Apl. 10, 1911.

“Ninety days after date I promise to pay to the order of Fourth National Bank twenty-four thousand four hundred and 00/100 dollars, at the Fourth National Bank, Nashville, Tennessee, for value received, without defalcation, and do hereby pledge to any holder hereof as collateral security for the payment of this note, the following property of the present market value as stated, to wit: One hundred shares Bauner Pub. Co.; one hundred shares Mecklenburg R. E. Co., Pfd.; twenty-five shares Nat'l Fert. Pfd.; forty shares Nat'l Fert. Com., and do hereby agree, on demand, to deposit with any holder hereof such additional security as they may from time to time require, should the security hereby pledged become unsatisfactory or less valuable.

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In case of failure to do so, this note shall forthwith become due and payable (less rebate of interest for the unexpired term at the rate charged), anything hereinbefore expressed to the contrary notwithstanding. Upon default of payment at maturity, whether such maturity occurs by expiration of time or by default in deposition additional security, as above agreed, any holder hereof is hereby authorized and empowered for the purposes of satisfying this note with interest and all costs, and a reasonable attorney's fee, which we agree to pay should same be incurred, to sell, transfer and deliver the whole or any part of said security, including additions thereto or substitutions therefor without any further demand for payment or for additional security, or advertisement or notice. Said sale may be public or private, either at broker's board or elsewhere, at any time or time thereafter, at the option of the then holder hereof. Any holder hereof shall have the right to purchase and become absolute owner, free from all trusts and claims, of any securities pledged hereon including additions and substitutions at any public sale hereunder. It is further agreed that the securitties hereby pledged, including additions and substitutions, shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation. All such securities in their hands shall stand as one general continuing security for the whole of such obligations so that the deficiency on any one shall be made good from the collateral upon the

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rest. In case of any sale hereunder the holder shall only be required to account for the net proceeds of said sale, and all parties liable hereon shall remain responsible for any deficiency in payment, and do waive any benefit of all exemptions or privileges under any law now in force or hereafter enacted. All parties hereon waive demand, notice and protest.

“[Signed]

E. B. STAHLMAN.”

At the time of the execution of that elaborate note, the entire indebtedness of E. B. Stahlman and wife under the aforesaid stock purchase contract was outstanding and unpaid, as it is now; and E. B. Stahlman was also indebted to the bank as indorser of other notes, amounting to about \$25,000, which other notes, except possibly some interest, have since been paid.

Can the bank hold the collaterals, pledged with the \$24,400 note of E. B. Stahlman, as security for the stock purchase contract of E. B. Stahlman and wife?

That is what the bank seeks and what Stahlman resists by appropriate pleadings.

The collaterals enumerated in the face of the \$24,400. note are worth that amount several times over. As has been seen, they are therein pledged primarily as security for the payment of that note, and in the face of that note, as has also been seen.

“It is further agreed that,” those collaterals “shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation.”

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What does this secondary provision mean in the light of the surrounding facts then and now? Nothing could be clearer than that "this obligation" means the \$24,400 note, and that "the holder of this obligation" means the Fourth National Bank, the payee and present owner of that note.

But what do the words, "any other obligations of the undersigned, whether past or future, held by the holder of this obligation" mean?

When that language was employed that bank "held" the \$25,000 of notes indorsed by E. B. Stahlman, "the undersigned," and it then "held" and still holds the \$45,000 stock purchase contract.

Stahlman's relation to those notes and to that contract was that of debtor, and that relation obviously comes within the language if not within the meaning, of the pledge. Those notes and that contract were other obligations of E. B. Stahlman, in the sense that he was bound in law to meet their requirements. As to the notes he had bound himself as indorser to see them paid; and as to the stock purchase contract he had bound himself to pay the price. He and his wife had contracted to pay the bank \$45,000 for the four hundred and fifty shares of stock. That contract made the purchasers of the stock debtors to the bank. It created an indebtedness from them to the bank, and that indebtedness was and is an obligation. Every debt implies an obligation to pay. A legal promise to pay a given sum creates a legal obligation to pay that sum.

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Every agreement to buy involves an obligation to pay the stipulated price. This court has said:

“A valid, subsisting obligation may be said to consist of a legal debt or duty.” *Cocke v. Hoffman*, 5 Lea, 112, 40 Am. Rep., 23.

Though not binding on Mrs. Stahlman because she is a married woman, the stock purchase contract was and is binding on E. B. Stahlman according to its terms, and, being so, it was and is an obligation on his part to pay the bank the \$45,000.

However, it is said in behalf of Stahlman, even though the stock purchase contract be binding on him and in one sense an obligation, it is nevertheless not within the meaning of the words of the pledge, “any other obligations,” because, as claimed for him, it is not the same kind of obligation as the \$24,400 note, in which those words are used, and because it did not arise in the usual course of banking business as did that note.

On the other hand it is said for the bank that the language of the pledge includes every kind of legal obligation of Stahlman to the bank, and that the parties must be held to have contemplated the stock purchase contract as one of his “other obligations” to which the collaterals were to be “applicable.”

The books afford numerous cases, tending, in a measure, to support each view. In *Gillet v. Bank of America*, 160 N. Y., 549, 55 N. E., 292 (cited by this court in *Bank v. Woods*, 125 Tenn., 16, 140 S. W., 31), it appeared that the firm of Dan Talmage’s Sons bor-

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rowed \$35,000 from the Bank of America, executing a note therefor and delivering therewith certain collaterals to insure the payment. The note, which was written on a form furnished by the bank, recited that the makers had—"deposited with the said bank as collateral security for the payment of this or any other liability or liabilities of the undersigned to said bank, due or to become due, or which may hereafter be contracted or existing."

Thereafter the bank purchased from an insurance company a past-due and dishonored note for \$5,000 made by the same firm, and sought to hold as security therefor the collaterals deposited with the \$35,000 note.

The court refused the relief sought, holding that the provision in the \$35,000 note as to collaterals should be construed as referring only to liabilities of the makers of that note "arising out of their ordinary dealings as bank and customer," and not to the customer's note to a third person purchased by the bank. In reaching that conclusion the court said the language of the agreement as to the collaterals should be construed liberally in favor of the makers, as in case of insurance policies and other similar instruments furnished by the company to the customer.

In *Loyd v. Lynchburg Bank*, 86 Va., 690, 11 S. E., 104, an unsuccessful effort was made to apply securities pledged with one note in payment of another note. The controlling words of the pledge were stated and construed by the court as follows:

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“The language, ‘if we should come under any other liability, or enter into any other engagement, with said bank, while it is the holder of this obligation,’ must be construed to refer to any other liability or engagement of the same kind with the one described in the former part of this contract.”

The language of the pledge, construed in the case of *First National Bank of Omaha v. Illinois Trust & Savings Bank* (C. C.), 84 Fed., 34, was:

“And also all other present or future demands of any kind of said bank against the undersigned, due or not due.”

The court held that the bank was not thereby authorized to apply collaterals, deposited with a borrowed money note containing those words, in payment of a previous loan for a term of years on real estate security, which loan had been assumed by a subsequent purchaser of the property. In the course of the opinion the court said:

“They (the parties to the pledge) evidently thought of these words (those quoted above) as including any and all such demands as might arise in the course of commercial banking.”

In *Brown v. James*, 80 Neb., 475, 114 N. W., 591, the words of the collateral note construed and applied were:

“For the payment of this or any other liability or liabilities of ours to said firm due or to become due, or which may be hereafter contracted.”

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That provision was held not to include a liability arising from a wrongful conversion of money, such a liability not being reasonably within the contemplation of the parties at the time the pledge was made. The court said:

“A fair interpretation of the agreement made in this case demands that it be construed to secure such indebtedness only as might be contracted by the parties in the legitimate transaction of business.”

The difference between joint liability and individual liability was the turning point in the case of *Torrance v. Third National Bank of Pittsburg*, 210 Fed., 806, 127 C. C. A., 356. Graham and Salusbury executed their joint and several note to their own order for \$43,000, and delivered it with their indorsement to the bank. At the same time they pledged jointly owned corporate stock as collateral security for the payment of that note—

“or any other liabilities, of the undersigned to the holder thereof, now due or to become due, or that may hereafter be contracted.”

The court held that the surplus of the collaterals could not legally be applied on notes indorsed by Graham and Salusbury individually—that only their joint liabilities were included in the language and meaning of the pledge,

In the case of *Harris v. Bank of Franklin*, 77 Md., 423, 26 Atl., 523 (cited in *Bank v. Wood*, 125 Tenn., 16, 140 S. W., 31), it appeared that Wilson borrowed \$2,000 from the bank, executed his note therefor, and

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deposited certain stocks and bonds to secure its payment. The note contained the secondary provision:

“It is also agreed that if I shall come under any other liability, or enter into any other engagement, with said bank while it is the holder of this obligation, that the net proceeds of sale of the above securities may be applied either on this note, or any other of my liabilities or engagements held by said bank, as its president or cashier may elect.”

The bank sought to hold those securities for a debt created five months previously, but failed. The court, referring to the language just quoted, observed:

“The plain and obvious meaning of the contract, and that which was contemplated by the parties at the time of its execution, was to cover future liabilities made after the execution of the note, and those entered into at the time of its delivery”

—and not a pre-existing debt.

Other courts have been somewhat less liberal towards the pledgor.

In *Hallowell v. Blackstone National Bank*, 154 Mass., 359, 28 N. E., 281, 13 L. R. A., 315, the court held that the words, “any excess of collaterals upon this note (executed by Smith to the bank for a loan) shall be applicable to any other note or claim against me held by said bank,” bound the excess of the collaterals as security for acceptances of a firm of which Smith was a member, discounted by the bank before the loan to Smith. The court said:

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“It cannot be denied that the acceptances were ‘claims against him.’ ”

Again:

“The clause pledging the property for any other claims against the debtor is not inserted with a view to certain specific debts, but as a dragnet to make sure that whatever comes to the creditor’s hands shall be held by the latter until its claims are satisfied.”

Following that case, the court, in *Norfleet v. Insurance Company*, 160 N. C., 329, 75 S. E., 937, held that the words, “any excess of collaterals upon this note shall be applicable to any other note or claim against me held by said bank,” included an open account, as well as another note of the pledgor, due to the bank. In the opinion the court observed:

“The language of the contract in this case is exceedingly broad. . . . We can hardly think of any more certain language that could have been employed by the parties to embrace this particular kind of obligation, if they had in mind, and intended at the time, to secure it by the deposit of collaterals.”

The last case was reaffirmed without discussion, in *Milling Company v. Steverson*, 161 N. C., 512, 77 S. E., 676, where the words, “any other obligation,” used in a pledge of collaterals, were held to include “any other indebtedness.”

It appeared in *Bank v. Lumber Company* (C. C.), 194 Fed., 732, that the Lumber Company, being already indebted to the bank in the sum of about \$43,500, bor-

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rowed from the bank the further sum of \$20,000, executing its note therefor and delivering certain corporate stock as collateral security. One of the questions in litigation which followed was whether the collateral was given to secure the payment of the \$20,000 alone, or to secure that note and also the other indebtedness of the Lumber Company to the bank. In deciding in favor of the latter view the court remarked:

“The words used in the note appear to be plain and unambiguous, for in the note it is stated: ‘The undersigned having herewith deposited as collateral security for the payment of this note and every other liability of the undersigned to said bank, direct or contingent, due or to become due, or which may hereafter be contracted or existing.’ . . . Language not as comprehensive nor as specific as that employed in this note in question has been held by several of the highest courts of the States to mean that the collateral was not given for the specific indebtedness of the note alone, but for all of the indebtedness” (citing cases from Alabama, Georgia, Illinois, Ohio and Massachusetts).

In *Wilson v. Carothers* (Ky.), 43 S. W., 684, it was disclosed that Carothers & Bro. were indebted to Wilson and Muir by two notes for \$1,000 each, and those notes were signed by other persons as sureties. While those notes were outstanding Carothers & Bro. executed other notes to Wilson and Muir for other sums and delivered to them certain collaterals—

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“as security for the payment of our notes this day executed, or any other unsecured liability, or liabilities of ours to Wilson & Muir.”

In construing that language, which it was contended on one side did not include the two \$1,000 notes, the court said:

“We think the clause, ‘or liabilities of ours to Wilson & Muir,’ is broad enough to include any liabilities which Carothers & Bro. were under to Wilson & Muir”

—and hence includes the two \$1,000 notes though they were signed by other persons as sureties of Carothers & Bro.

Our court of chancery appeals in the case of *Hanover National Bank v. Brown*, 53 S. W., 206 (affirmed orally by this court), held that the excess, if any, of collaterals pledged for the payment of a note to the bank for \$25,000 of borrowed money, “or any other liability or liabilities of ours to the said bank, due or to become due,” could be applied by the holder on notes of the maker previously rediscounted for him by the holder.

The ruling in that case was approved in *Bank v. Wood*, 125 Tenn., 16, 140 S. W., 31, where it was decided, in an opinion by Mr. Justice Green, that a written pledge of additional collaterals was controlled by its own terms, and not by general provisions as to additional collaterals and renewals found in the face of a collateral note, previously executed and subsequently renewed. General provisions in the note were not allowed to “override, add to, or vary the terms of a definite written agreement particularly witnessing

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the pledge of this property," as did the agreement pledging additional collaterals.

In the opinion the court in that case further said:

"While it has been held in *Tennessee (Hanover National Bank v. Brown*, 53 S. W., 206), that these provisions in a note authorizing a bank to hold, as security for a general indebtedness, property pledged for a particular debt are valid, nevertheless an examination of the authorities shows the rule to be that such an agreement will not be construed so as to extend the obligation beyond that intended by the pledgor; and, if such agreement is on a printed form furnished by the bank and signed by its customer, and any doubt arises as to its proper interpretation, it will be construed in favor of the customer." 125 Tenn., 16, 140 S. W., 31.

None of the numerous cases mentioned by us, nor any of the many other kindred cases that could be mentioned, furnish an exact parallel to the present case, either in the words of the pledge or in the attendant facts; none of them afford a conclusive criterion throughout for the decision of this case. After all, and properly, this case must stand and must be decided upon its own particular facts, which are different in some aspects from all other cases.

The \$24,400 note, with its several provisions, including those in reference to the collaterals now in question, is a contract; and, as in other contracts, the intention of the parties, when ascertained under proper rules of construction, if lawful, will be enforced by the court.

It is well observed, in a case already mentioned, that:

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“In the construction of written contracts it is the duty of the court, as near as may be, to place itself in the situation of the parties, and from a consideration of the surrounding circumstances, the occasion and apparent object of the parties, to determine the meaning and the intent of the language employed. Indeed, the great object, and practically the only foundation of the rules for the construction of contracts is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties, and the objects which they had in view, and when the intent is thus ascertained, it is to be effectuated unless forbidden by law. ‘Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose, which the parties sought to accomplish.’ ” *Gillet v. Bank of America*, 160 N. Y., 555, 556, 55 N. E., 292.

Applying that familiar rule of construction and considering especially the fact that this contract was written in a blank form furnished by the bank to its customer, we have come to the conclusion that the language employed by the parties in this case means and was by them both intended to mean, that the collaterals pledged with the \$24,400 note should, after the payment of that note, be “applicable” also “to any other obligations” of E. B. Stahlman to the bank, including the \$45,000 stock purchase contract.

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This we think does not extend the scope of the pledge “beyond that intended by the pledgor,” but is in accord with the intention of both of the parties. The language of the pledge is very broad and comprehensive. It could not well have been more so. Viewed in the light of the surrounding facts and circumstances, the meaning of that language is so plain and obvious as not to admit of any doubt to be resolved in favor of the pledgor, as should be done in case of doubt, the blank in which the pledge is written having been furnished by the bank.

It is only where the language is ambiguous and the meaning in doubt, or where the meaning to such effect is clear, that the secondary provision in a collateral note made to a bank by its customer will be limited to other liabilities, or other obligations, “arising out of their ordinary dealings as bank and customer” (*Gillet v. Bank*, supra), or “in the course of commercial banking” (*First Nat. Bank v. Ill. T. & S. Bank*, supra), or “of the same kind with the one described in the former part of the contract” (*Loyd v. Lynchburg Bank*, supra), or joint and not individual (*Torrance v. Third Nat. Bank*, supra), or simultaneous and future but not pre-existing (*Bank v. Harris*, supra). Where the language is plain and the meaning obvious to such effect, the court must hold that the pledge includes all other legal liabilities or obligations.

Being already indebted to the bank in the matter of the \$45,000 stock purchase contract and also as indorser of \$25,000 of notes of other persons (since paid), F. B.

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Stahlman executed to the bank the \$24,400 note, pledging therewith the collaterals now in question, they being of a market value several times as great as that note. The collaterals were pledged first to secure the payment of that note, and then "to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation;" and this stock purchase contract was then one of the pledgor's past obligations, which he manifestly intended to secure, and but for the securing of which he, as an experienced and intelligent business man, would have withheld the larger part of the collaterals actually pledged.

That such was the intention of the parties is emphasized, we think, by the next sentence in the note, as follows:

"All such securities in their hands shall stand as one general continuing security for the whole of said obligations, so that the deficiency on any one shall be made good from the collateral upon the rest."

Applied to the facts of this case that provision means that any deficiency that may occur in the collaterals put up with the \$45,000 stock purchase contract shall be made good from the collaterals pledged with the \$24,400 note.

It may be well to remark, in reference to the language of this pledge, that it cannot properly be construed to mean that another bank to which the Fourth National Bank, the payee, might have transferred the \$24,400 note with its collaterals could hold those collaterals as

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security for other debts which Stahlman might have created with that other bank. To so construe the pledge would be to extend its scope "beyond that intended by the pledgor," and to do what the court said, in *Bank v. Wood*, 125 Tenn., 16, 140 S. W., 31, cannot be done. Such other debts to such other bank in the supposed case could not be held to have been in the contemplation of the parties when the collaterals were put up with the \$24,400 note; hence they could not have the benefit of that pledge. Only that note and any other obligations of Stahlman, past or future, to the Fourth National Bank can reasonably be said to have been within the contemplation of the parties; and for that reason only that note and such other obligations could fall within the scope of the pledge. Another bank holding that note and those other obligations, including the stock purchase contract, would be allowed to hold these collaterals for that note and those other obligations, because all of them were contemplated when the pledge was made; but the collaterals could not be held for other debts created with another bank, because such other debts were not contemplated.

The observation may also be made, in construing the provisions of this pledge, that a surety or an indorser on the \$24,400 note, had there been one and had he paid the note, would by the payment, *ipso facto* nothing else appearing, have become entitled to be subrogated to the place of the bank as to these collaterals to the extent of the payment made; and such right of subrogation could not be defeated by the application

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of the collaterals on any other debts to the bank, the collaterals being pledged primarily, as we have seen, for the payment of the \$24,400 note.

MR. JUSTICE WILLIAMS delivered a dissenting opinion as follows:

Unable to agree with the majority of the court in its ruling as to the construction of the language of the \$24,400 note in relation to the indebtedness secured by certificates of stock pledged immediately as collateral thereto, the grounds of dissent shall be expressed as briefly as practicable.

This court is committed by the case of *Bank v. Wood*, 125 Tenn., 16, 140 S. W., 31, to the view, now generally held, that this language must receive a construction in favor of the pledgor if there be room for construction.

The identical language of the pledge for construction, or its equivalent in substance, is in common use by the bankers of all the States of the Union, and the effect to be given to it is far-reaching.

It is the contention of the bank that the phrase in the note executed by E. B. Stahlman, "the securities hereby pledged, including additions and substitutions, shall be applicable in like manner to secure the payment of any other obligations of the undersigned whether past or future, held by the holder of this obligation," is effective to secure a previous obligation of E. B. Stahlman and wife to take over from the bank \$45,000 of the preferred capital stock of a real estate corporation, which contract ran for the long period of seven years and which further provided for its own

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security by collaterals—insurance policies on the life of E. B. Stahlman pledged therewith.

In my view the authorities cited in the opinion of the majority amply demonstrate that the certificates of stock in the Banner Publishing Company, hypothecated with the \$24,400 note, may not be held to await the maturity of or to secure this earlier obligation. Only two of those cases at all militate against this view, *Hallowell v. Blackstone Nat. Bank*, 154 Mass., 359, 28 N. E., 281, 13 L. R. A., 315, and *Wilson v. Carothers* (Ky.), 43 S. W., 684, and of these it may be remarked that the first was by a divided court, and is directly contrary to the later cases, and the second never reached the dignity of being officially reported.

The other cases either are colorless on the real point here in contest or plainly sustain the pledgor's position in the instant case. The rule to be extracted from them is that the words, "other obligations held by the holder of this obligation," refer to obligations of like character as to makership, and as to the channel in which the paper runs—in the pending case the reference being to other obligations incurred "in the course of commercial banking" (*First Nat. Bank of Omaha v. Illinois Trust & Savings Bank* [C. C.], 84 Fed., 34), or obligations of a customer to a bank in the ordinary course of banking business (*Gillet v. Bank of America*, 160 N. Y., 549, 55 N. E., 292, cited with approval by this court in *Bank v. Wood*, and the rule of which is adopted as sound by Mr. Jones in his standard work on Collateral Securities [3d Ed.], sec. 361b).

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Passing without further comment the fact that the earlier obligation was that of Stahlman and wife and the later one that of Stahlman alone, it seems clear that the former was in no sense an obligation incurred by Stahlman as a customer in the ordinary course of commercial banking. Indeed, it is to be observed that the court in this case has itself treated the stock purchase transaction as one not free from serious question as to its being wholly nonbanking in character—*ultra vires* the bank. Certainly it cannot be said to fall within the class of ordinary commercial banking transactions, and as certainly that it was not executed by Stahlman as a customer of the bank. He dealt in a distinct capacity.

It is to be noted in this connection that that contract was one that ran for a term of years, as was the case in *First Nat. Bank of Omaha v. Illinois Trust & Savings Bank*, supra. Let it be assumed that the \$24,400 bank note had been executed in 1906, early in the life of the stock purchase contract. The holding of the majority can but mean that the hypothecated shares of stock of the pledgor in the Banner Company would continue to be held in pledge until the end of that long term, despite the full payment to the bank of the note and a demand for their surrender. Is it a sound policy that would admit of this, for the security of a nonbanking obligation? Corporate stock, which is subject to rapid fluctuations in value, should be kept as liquid as possible. It is not to the advantage of the commercial interests of a commonwealth that shares be

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tioned up for years by a construction of the note contract, especially when that is not sustainable on authority.

Another angle may be presented by another assumption for test purposes: That, as is not infrequently the case, a note with similar provisions respecting collaterals has also a surety or indorser, and that at maturity the surety or indorser is compelled to pay the note. Is it fair lines for a court to read the surety that he must be denied subrogation and possession of the pledged shares after payment and until such a land stock contract has matured? It may be fair to impute to such a surety knowledge that the pledgor principal has or may have other obligations, executed by him in the course of banking as customer, outstanding to the pledgee, which are secured in priority to any right of his to subrogation; but it is going too far to hold that the surety must have had in contemplation as a part of his risk such a long-time, optional contract of purchase of shares in a real estate corporation.

It is fairly evident that the majority was not unappreciative of the hardship that would be thus involved, and they attempt an escape from it by false reasoning. It is argued in the prevailing opinion that "such right of subrogation could not be defeated by the application of the collateral on any other debts to the bank, the collaterals being pledged primarily, as we have seen, for the payment of the \$24,400 note." It is submitted that neither on reason nor by authority

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may the hypothecation be deemed to be primarily for the payment of the note as contradistinguished from the land stock contract, if the security of the latter be granted. In terms the pledged shares would be "applicable in like manner" to secure the latter and the former. Had such terms been unexpressed, the authorities are uniform to the effect that there is no such primacy or priority as between the indebtednesses or obligations so secured. Mr. Jones says on the point:

"Thus, where one was indebted to a bank for several loans made at different times, and at the times when two of the loans were obtained he pledged certain notes as collateral security under an agreement declaring, 'that for the punctual payment of this or any other sum which I have obtained, or may hereafter obtain, on loan or discount from said bank, these notes are hereby pledged and made liable,' . . . it was held that the bank was under no obligation first to apply the security to the payment of the loan obtained when the security was given, that the language of the contract could not be construed as giving a preference or priority to any particular debt, and that the creditor had a right to apply the proceeds of the security as he saw fit." Collateral Securities (3d Ed.), sec. 355b; *Richardson v. Washington Bank*, 3 Metc. (Mass.), 536; *Fall River Nat. Bank v. Slade*, 153 Mass., 415, 26 N. E., 843, 12 L. R. A., 131.

And the right of the surety is in such case postponed until he has paid or tendered "the whole amount of the debts for which the security was given." Same

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authorities; *Titcomb v. McAllister*, 81 Me., 399, 17 Atl., 315.

At first blush the ruling in favor of the appellee on this point may be thought to be altogether favorable to banks, but it is not improbable that practical bankers may entertain a contrary view, as they bring under consideration the fact that a pledgor who is under a long-time non-banking obligation to a bank as was appellant Stahlman cannot afford to borrow on short-time notes collateral in form from that institution, without experiencing the embarrassment of having the securities hypothecated tied up. The tendency of the precedent will be to cause such an one to go to some other bank for his current accommodations which, as bankers know, may well mean the weaning away of the customer to the other bank. A ruling that has such a tendency, in my view, is not based upon sound policy, and as has been seen it runs counter to the precedents.

Liggett & Myers Tobacco Co. v. Cannon.

LIGGETT & MYERS TOBACCO CO. v. J. J. CANNON.

*(Jackson. April Term, 1915.)***1. FOOD. Chewing tobacco. Impurities. Manufacturer's liability to consumer.**

Tobacco, even chewing tobacco, is not a foodstuff, within the exception of foodstuffs from the rule that ordinarily the manufacturer of an article placed by him on the market for sale, and sold by another, is not liable to the ultimate consumer for injuries from defects or impurities in it; "food" including only what tends to build bodily tissues. (*Post*, p. 421.)

Cases cited and approved: *Burkett v. Manufacturing Co.*, 126 Tenn., 467; *Boyd v. Coca Cola Bottling Works*, 132 Tenn., 23; *Com. v. Pflaum*, 236 Pa., 294; *State v. Ohmer*, 34 Mo. App., 115; *Austin v. State*, 101 Tenn., 563; *Bishop v. Weber*, 139 Mass., 411.

Case cited and distinguished: *Ketterer v. Armour & Co.* (D. C.), 200 Fed., 322.

2. NEGLIGENCE. Liability of manufacturer. Defective article.

The manufacturer of chewing tobacco is not liable for injury to the ultimate consumer, a purchaser from a retailer, for injuries from a bug imbedded in a plug; it having no knowledge or notice of its presence and the consequent danger of using the tobacco. (*Post*, p. 425.)

Cases cited and approved: *Standard Oil Co. v. Murray*, 119 Fed., 572; *Salmon v. Libby*, 114 Ill. App., 258; *McCaffrey v. Mossberg & Co.*, 23 R. I., 381; *Bragdon v. Perkins & Co.*, 87 Fed., 109; *Zieman v. Kieckhefer E. M. Co.*, 90 Wis., 497; *Loop v. Litchfield*, 42 N. Y., 351; *Huset v. Threshing M. Co.*, 120 Fed., 865; *Burkett v. Manufacturing Co.*, 126 Tenn., 467; *Cadillac Motor Car Co. v. Johnson*, 221 Fed., 801; *Lebourdias v. Vitrified Wheel Co.*, 194 Mass., 341.

Case cited and distinguished. *Hasbrouck v. Armour & Co.*, 139 Wis., 357.

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FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—WALTER MALONE, Judge.

JOHN E. BELL and TANSIL & LANIER, for petitioner.

STEEN & KLEWER, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This cause is before us on a petition filed by J. J. Cannon for a writ of *certiorari* to review a judgment of the court of civil appeals adverse to him, in that a judgment of the circuit court in his favor as plaintiff in this action was reversed, and his suit dismissed, by the court of civil appeals upon the motion for peremptory instructions interposed in the court below by the Tobacco Company.

Cannon purchased of a retail dealer in the city of Memphis a five-cent plug of Star-Navy chewing tobacco, the product of one of the factories of the defendant company, which tobacco had come into the possession of the retailer through intermediate wholesale dealer or dealers. Cannon bit a "chew" from the plug, and within a few minutes his mouth and lips began to smart. Examining the remnant of the

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plug he found impressed and imbedded under its top wrapper or leaf cover a large black bug, which he had just bitten in two. He took the partly masticated quid from his mouth, and found "a black something mashed up in it"—a part of the bug he had chewed. Cannon's face was soon in a swollen condition; he became dizzy, and sent for a physician to alleviate his pain.

The theory of the plaintiff in his pleading and proof was that the bug had been negligently manufactured in the plug of tobacco by the defendant company.

The motion of the company for a directed verdict was based upon the grounds, first, that it owed the plaintiff no duty with reference to the tobacco, because of the absence of any contractual relation between it and plaintiff; and, second, that no negligence on its part had been shown by the proof.

The general and true rule undoubtedly is that laid down in the recent case of *Burkett v. Manufacturing Company*, 126 Tenn., 467, 150 S. W., 421, that ordinarily the manufacturer of an article or commodity placed by him on the market for sale and sold by another to an ultimate consumer is not liable to the last-named for injuries due to defects or impurities in the article or commodity. But to this rule there are well-recognized exceptions, as is there set forth; one of these being foodstuffs, *Boyd v. Coca Cola Bottling Works*, 132 Tenn., 23, 177 S. W., 80.

The contention of plaintiff, Cannon, is that tobacco is to be classed as a food, and is thus to fall within

an exception to the general rule. The court of civil appeals, in substance, sustained this contention, saying:

“While tobacco may not be strictly a food, it occurs to us that the same reasons which underlie the rule of liability in the case of sale for immediate use of drugs, foods, and beverages would apply in the case of tobacco, especially chewing tobacco. The reasons for the rule holding manufacturers of foods liable to purchasers from intermediate dealers, where such food is bought for immediate use, is that the putting of such articles on the market is dangerous to the public; and we think the same rule should be applied to the manufacturer of chewing tobacco. Such manufacturer sells it, knowing that it is to be taken into the human mouth, and that, if it is poisonous, it will as readily poison the user as if it were a food to be taken into the stomach. So we are of the opinion that the first reason given why the trial court should have directed a verdict is not well based.”

We are unable to follow the court of civil appeals, either in its argument or to its conclusion as to the *status* properly assignable to tobacco in this regard.

The term “food” includes everything that is eaten or drunk for the nourishment of the body—any substance that is taken into the body, which serves, through organic action, to build up normal tissues or to supply the waste of tissue. *Com. v. Pflaum*, 236 Pa., 294, 84 Atl., 842, Ann. Cas., 1913E, 1287; Wiley, *Foods and Their Adulteration*, 7.

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We think it manifest that tobacco is not a foodstuff. It does not tend to build bodily tissue, and as to the average adult its tendency is widely thought to retard the building up of fatty tissue. In respect of its use by the young, it cannot be doubted that it tends to stunt normal development and even growth in stature. The desire or appetite for food is natural and common to all of the human race, while the desire for tobacco must be created.

“There is no nutriment in tobacco. It is merely a narcotic. It is not generally regarded as an article of food. It could hardly be said that an indictment for selling unwholesome food could be sustained by proof that defendant sold a bad or unwholesome cigar.” So the sale of tobacco and cigars on Sunday is not authorized under a statute prohibiting the sale of any goods and wares on that day, except drugs or medicines, provisions, and other articles of immediate necessity. *State v. Ohmer*, 34 Mo. App., 115.

This court has held that tobacco in one form, the cigarette, is not a legitimate article of commerce, because possessed of no virtue, being bad inherently. *Austin v. State*, 101 Tenn., 563, 48 S. W., 305, 50 L. R. A., 478, 70 Am. St. Rep., 703, affirmed 179 U. S., 343, 21 Sup. Ct., 132, 45 L. Ed., 224.

The admission of foodstuffs among those classes of commodities excepted from the general rule of non-liability to the ultimate consumer on the part of the manufacturer is comparatively recent, and this was done because of the close analogy of such commodity

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to drugs. Thus, in *Bishop v. Weber*, 139 Mass., 411, 1 N. E., 154, 52 Am. Rep., 715, it was said that the furnishing of provisions which endanger human life or health stands "clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties."

Such inclusion of foods among the excepted articles of commerce was based upon public policy and compelling necessity.

The best statement is that embodied in *Ketterer v. Armour & Co.* (D. C.), 200 Fed., 322, by Noyes, J.:

"Public policy regards the public good, and I am yet to be convinced that the public welfare will be promoted by holding that producers and manufacturers owe no duty to consumers to guard against diseased and poisonous meats and provisions, except in those isolated cases where they happen to sell directly to them. . . . It (the remedy) should rest, as was once said, upon 'the demands of social justice.' "

Foods are used as a matter of necessity in the support of life by all mankind, from the infant to the aged. The legislatures have accordingly undertaken to give safeguards to the consuming public by way of pure food statutes.

Tobacco has not been so treated. On the contrary, it has been deemed a fit article on which to levy heavy internal revenue taxes; and, as we have seen, the sale of tobacco in certain forms has been restricted and undertaken to be prevented by statute.

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It is, we think, apparent that the same consideration of public welfare cannot support the enlargement of the class of foodstuffs proper, so as to include tobacco, even in the form of chewing tobacco, and that public policy as thus far declared is, as it should continue to be, not favorable to a classification that would protect its ultimate consumer under the rule above outlined.

The liability of a manufacturer of tobacco should not be carried to the extent asked by plaintiff, when there is thus a failure to justify its imposition. The door to fraud would be opened wide for false claims on the part of consumers against distant manufacturers, who would be under serious handicaps in making defense. The rule would invite a flood of litigation, in which the parties would lack much of having an equal opportunity to adduce proof that a claimed defect did or did not exist, or that there was or was not negligence imputable to the manufacturer as to the particular article purchased in open market.

In our view, the liability of the defendant company must be made out under the general rule, if at all. The case is closely akin to the well-reasoned case of *Hasbrouck v. Armour & Co.*, 139 Wis., 357, 121 N. W., 157, 23 L. R. A. (N. S.), 876, which was an action by an ultimate consumer against the manufacturer of a toilet soap, a cake of which contained a needle or a sharp piece of steel, not visible. The presence of this foreign substance rendered the article dangerous, and the result of its use by the plaintiff was a bodily injury and an impairment of his health. After adverting

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to cases of liability falling under exceptions to the general rule, the court ruled against the plaintiff, saying:

“But where the manufacturer or vendor had not at the time of the injury brought himself into any privity with the person injured, within the rule of the foregoing cases or similar and analogous circumstances, the duty which the law imposes in favor of the user or consumer upon a manufacturer or dealer selling at wholesale to dealers generally, but not selling to consumers directly, is identical with the duty imposed by law on all persons with respect to the public generally. There is no privity, no particular relation, carrying with it special duties or a special degree of care in such case. *Standard Oil Co. v. Murray*, 119 Fed., 572, 57 C. C. A., 1; *Salmon v. Libby et al.*, 114 Ill. App., 258; *McCaffrey v. Mossberg & Co.*, 23 R. I., 381, 50 Atl., 651, 55 L. R. A., 822, 91 Am. St. Rep., 637; *Bragdon v. Perkins & Co.*, 87 Fed., 109, 30 C. C. A., 567, 66 L. R. A., 924; *Zieman v. Kieckhefer E. M. Co.*, 90 Wis., 497, 63 N. W., 1021; *Loop v. Litchfield*, 42 N. Y., 351, 1 Am. Rep., 513. The cases are collected in *Huset v. Threshing M. Co.*, 120 Fed. 865, 57 C. C. A., 237, 61 L. R. A., 303, and the rule well stated from the viewpoint that no duty rests upon the manufacturer and seller to dealers in favor of the purchaser from the latter, with certain specified exceptions. . . .

“The manufacturer or vendor should have no immunity from duties common to all merely because he is a manufacturer or vendor. At the same time there

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is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in the instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of nonliability.”

¶ In the absence of a duty owed by the defendant company as manufacturer of the plug of tobacco, the failure to observe which would be actionable, a case of liability can only be made by a showing of knowledge, or a reasonable means of knowledge from anything brought to the notice of the manufacturer, that the use by the consumer would be dangerous. In that event knowledge or notice disregarded gives to the transaction the color of fraud, with consequent liability to the distant consumer injured.] *Burkett v. Manufacturing Co.*, supra; *Hasbrouck v. Armour & Co.*, supra; *Cadillac Motor Car Co. v. Johnson*, 221 Fed., 801, — C. C. A., —; *Lebourdias v. Vitrified Wheel Co.*, 194 Mass., 341, 80 N. E., 482.

In the instant case there is no proof or contention that the tobacco was put on the market with knowledge on the part of defendant that the bug was so imbedded. On the contrary, the proof shows that the plant of defendant was sanitary in its appointments, that the process of manufacture was under continuous inspection until the tobacco was put into plug form, and that there were maintained appliances for keeping the tobacco until completed as to manufacture clear of dirt or any foreign substances.

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The court of civil appeals reversed the judgment of the circuit-court, and sustained defendant's motion for a directed verdict, on the ground that negligence was not shown but negatived.

A correct result having been reached by that court, we affirm its judgment.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

NASHVILLE, SPECIAL TERM, 1915.

R. MILES BURNS *et al.* v. CITY OF NASHVILLE *et al.*

(*Nashville*. Special Term, 1915.)

1. COURTS. Appellate jurisdiction. Tennessee supreme court. In view of Acts 1907, ch. 82, creating the court of civil appeals, with appellate jurisdiction of all civil cases coming up from the law and equity courts, except cases involving constitutional questions or chancery cases involving more than \$1,000, etc., an incidental prayer for the recovery of a money judgment in excess of \$1,000 will not confer appellate jurisdiction upon the supreme court, when the main purpose of the suit is to obtain some relief other than a money judgment; and the value of property involved is immaterial in determining jurisdiction, except in those cases wherein a direct money decree is sought as the end or purpose of the litigation. (*Post*, p. 434.)

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Cases cited and approved: *Chattanooga v. Railroad*, 123 Tenn., 497; *Morris v. Railroad*, 124 Tenn., 524; *State ex rel. v. Corum*, 123 Tenn., 394.

2. COURTS. Appellate jurisdiction. Tennessee supreme court. Statutes.

Acts 1907, ch. 82, creates the court of civil appeals, with appellate jurisdiction of all civil cases coming up from the law and equity courts, except cases involving constitutional questions or chancery cases involving more than \$1,000, etc. A taxpayers' bill in chancery against the city of Nashville, its commissioners, and the city treasurer, officially and individually, and against the surety on their bonds, charged, among other unlawful acts, wasteful and dishonest management of the city's financial affairs, sought to restrain the commissioners from exercising certain functions of their offices and from making further contracts for the city, or from paying out any of its funds, prayed that a receiver be appointed to take charge of the finances and property of the city, and asked a reference to determine what amount of the city's money had been misappropriated, and a decree therefor against such officers and their surety, and, as amended, alleged that the commissioners had unlawfully expended \$14,000 for the erection of a new market house, and asked judgment against them for that sum, and made certain contractors, banks, etc., parties defendant, charged with unlawful participation in the misappropriation of the city's funds, and sought a decree against them. The chancellor's interlocutory orders restraining the commissioners in the expenditure of the city's funds and appointing a receiver for the city, on petitions for *certiorari* and *supersedeas*, were superseded by the presiding judge of the court of civil appeals. *Held*, that *certiorari* to annul the order of the court of civil appeals on the ground of its want of jurisdiction would be denied, as the supreme court could not say that any judgment for any sum of money would be rendered against any party on the final hearing, and could not foretell to which court an appeal would lie after the final decree. (*Post*, p. 435.)

Acts cited and construed: Acts 1907, ch. 82.

Case cited and approved: *Humphrey v. Godsey*, 119 Tenn., 43.

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3. STATUTES. Construction. Exceptions.

Where a general rule has been established by statute, with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumerations weaken it as to things not expressed. (*Post*, p. 435.)

4. COURTS. Appellate jurisdiction. Test.

Jurisdiction on appeal is to be tested by the matter in controversy on appeal, and not by the matters which may have been involved in the lower court. (*Post*, p. 435.)

5. CERTIORARI. Jurisdiction. Supreme court.

Under Acts 1907, ch. 82, sec. 8, providing for the review by the supreme court upon *certiorari* of the cases appealed to the court of civil appeals, the supreme court can take jurisdiction of such cases only through the writ of *certiorari*, and only after final decree or judgment in the court of civil appeals, and is without power to review the interlocutory orders of that court or its judges in matters within its jurisdiction. (*Post*, p. 438.)

Cases cited and approved: Walker v. Lemma, 129 Tenn., 444; Sharp v. Rose, 130 Tenn., 228.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson county to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
JOHN ALLISON, Chancellor.

H. S. STOKES, J. G. STEPHENSON and W. C. CHERRY,
for plaintiffs.

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JOHN T. LELLYETT, FRANK LANGFORD, and PITTS & McCONNICO, for defendant.

MR. JUSTICE GREEN delivered the opinion of the Court.

The original bill was filed by certain taxpayers against the city of Nashville, against the commissioners thereof, officially and individually, against the city treasurer, officially and individually, and against the United States Fidelity & Guaranty Company, surety on the bonds of all these officers. Many unlawful acts were charged against said officials, especially illegal, wasteful, and dishonest management of the city's financial affairs. An injunction was sought to restrain said commissioners from exercising certain of the functions of their offices, to restrain them from making any further contracts for the city, or paying out any of the city's funds, and it was prayed that a receiver be appointed to take charge of the finances and properties of the city of Nashville. A reference was asked to determine what amount of the city's money had been misappropriated by said officers, and a decree for the same was sought against said defendants and their surety. There was no prayer for any specific sum as a money recovery.

An amendment was made to the bill, in which it was alleged that the commissioners had unlawfully expended \$14,000 for the erection of a new market house, and judgment against them for this sum was asked.

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Further amendments followed, by which certain contractors, banks, and others were made defendants, and were charged with participation in various unlawful applications of the city's funds, and a decree was sought against said new parties, as well as the commissioners and their bondsman, for such irregular expenditures. These alleged misapplications aggregated many thousands of dollars.

Defendants filed sundry pleadings not necessary to be considered here.

The chancellor made two interlocutory orders, the first restraining the commissioners in the expenditure of the city's funds, and the second appointing a receiver, with enumerated powers, for the city of Nashville. Upon petitions for *certiorari* and *supersedeas*, addressed to him, the presiding judge of the court of civil appeals superseded both these orders.

We are asked to take jurisdiction of the case by petition for *certiorari*, and to annul the order of the presiding judge of the court of civil appeals. This petition proceeds on the theory that the court of civil appeals was wholly without jurisdiction herein, and that the orders made by the judge of that court were mere nullities. It is insisted that appellate jurisdiction of the cause is in this court, and that the application for interlocutory revisory process could only have been granted by the court or a member thereof.

An answer to the petition for *certiorari* is before us, in which the jurisdiction of the court of civil appeals is maintained, and that of this court denied.

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It is somewhat difficult to determine what is the principal end or purpose of this litigation. We have said in *Chattanooga v. Railroad*, 123 Tenn., 497, 130 S. W., 840, *Morris v. Railroad*, 124 Tenn., 524, 137 S. W., 759, and other cases, that an incidental prayer for the recovery of a money judgment in excess of \$1,000 will not confer appellate jurisdiction upon this court, when the main purpose of the suit is to obtain some relief other than a money judgment.

It is well settled, of course, that the value of "property involved is immaterial, for the purpose of determining jurisdiction, except in those cases wherein a direct money decree is sought as the end or purpose of the litigation." *Chattanooga v. Railway*, 123 Tenn., 497, 130 S. W., 840; *State ex rel. v. Corum*, 123 Tenn., 394, 131 S. W., 861.

It is plausibly argued upon this hearing that the principal purpose of the bill of Burns and others was to prevent further waste of the city's finances by the commissioners and to have a receiver appointed to conserve the city's properties. However, it appears that the bill and its amendments allege the unlawful expenditure of the specific sum of \$14,000 by these commissioners for a market house and the unlawful expenditure of sums which are very much larger about other matters, and it is sought to recover these sums.

As stated before, it is difficult to determine what is the paramount object of the litigation. All the matters are of great importance, and it is hard to say that any one could be treated as incidental.

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Chapter 82 of the Acts of 1907, creating the court of civil appeals, confers upon that court appellate jurisdiction of all civil cases coming up from the law and equity courts of this State, with certain exceptions named; that is to say, the act gives the court of civil appeals immediate supervision of all civil litigation in the lower courts, unless such litigation is of the particular character excepted by the act.

“Where a general rule has been established by statute, with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law and enumerations weaken it as to things not expressed.” Sutherland on Statutory Construction, sec. 328.

Applying this rule of construction, inasmuch as general jurisdiction of civil appeals lies in the court of civil appeals, and the jurisdiction of this court exists only in exceptional cases, it follows that this court cannot assert jurisdiction, unless a particular case falls clearly within one of the exceptions enumerated; that is to say, unless we plainly see that we have jurisdiction of a particular case, we must conclude that the matter is one for the supervision of the court of civil appeals.

It is thoroughly established that jurisdiction on appeal is to be tested by the matter in controversy on appeal, and not by the matters which may have been involved in the lower courts. This principle is settled in *Humphrey et al. v. Godsey*, 119 Tenn., 43, 109 S. W., 1005. This case has been followed and this principle

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applied in numerous unreported decisions of this court.

No matter how much money may have been sued for below, if a judgment is rendered for less than \$1,000 and only the defendant appeals, the case goes to the court of civil appeals. We cannot say at this time that any judgment for any sum of money will be rendered against any party hereto on the final hearing. Unless such a judgment should be rendered, so far as we can now see, there is nothing in the case by reason of which this court could ever acquire immediate appellate jurisdiction thereof.

The rule being that jurisdiction is determined by the thing in controversy on appeal, it must follow that, in a case where it is impossible to foretell to which court an appeal will lie after final decree, interlocutory appeals, so to speak, must be tested for jurisdictional purposes by the nature of the matter actually presented on such interlocutory application.

The two orders of the chancellor from which relief is sought are an injunctive order and an order appointing a receiver for the city of Nashville. If the propriety of these orders, and nothing more, was called into question after final decree below, unquestionably the court of civil appeals would have jurisdiction. This court would be without power to entertain an appeal in such matters, unless they came before us incidentally in a case which reached us on account of some other feature bringing it within our jurisdiction.

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We cannot now know that this case will contain any element on appeal after final decree which will bring it to this court. We cannot now say, therefore, that the appointment of a receiver and the injunction against the city commissioners are incidental. These things, and nothing else, may be in litigation on appeal.

At present there is certainly nothing in controversy on these petitions for *certiorari* and *supersedeas* to give this court jurisdiction. By the statute the court of civil appeals is clothed with authority to determine the propriety of decrees below appointing receivers and ordering injunctions. Such power is withheld by the same statute from this court. When only such questions are involved, jurisdiction lies in the court of civil appeals, and not in this court. Supervision of the action of the lower courts in such matters, when nothing else is involved, being intrusted to the court of civil appeals, we do not see that the case is different, whether the aid of that court be invoked by petition to supersede interlocutory orders or by appeal to review a final decree.

We must conclude, therefore, that this controversy in its present *status* is within the supervisory jurisdiction of the court of civil appeals, and that the presiding judge of that court acted within his competency in ordering the writs of *certiorari* and *supersedeas* herein attacked.

The case, therefore, appearing to be, so far as can now be determined, within the jurisdiction of the court of civil appeals, we are, of course, without power to

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supersede or interfere with an interlocutory order of that court, or such an order of a judge thereof.

We can reach cases in the court of civil appeals, of which that court has jurisdiction, only through the writ of *certiorari*, and only after final decree or judgment in that court. We are without power to review the interlocutory orders of that court or its judges in matters within its jurisdiction. *Walker v. Lemma*, 129 Tenn., 444, 167 S. W., 474; *Sharp v. Rose*, 130 Tenn., 228, 169 S. W., 765.

It results that the petition for *certiorari*, directed at the action of the presiding judge of the court of civil appeals, must be denied.

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STATE *ex rel.* OLIVER J. TIMOTHY *et al.* v. J. D. ALEXANDER *et al.**

(Nashville. Special Term, 1915.)

1. COURTS. Court of civil appeals. Jurisdiction. Ouster suits. Acts 1907, ch. 82, sec. 7, gives the court of civil appeals appellate jurisdiction of cases brought up from equity or chancery courts, with certain exceptions, and cases tried in the circuit and common-law courts in which writs of error or appeals in the nature of writs of error are applied for, and provides that in cases in which appellate jurisdiction is not conferred upon such court appeals shall be direct to the supreme court, and writs of error, *certiorari*, and *supersedeas* shall be issued by that court. Ouster Act (Acts 1915, ch. 11), sec. 9, gives the supreme court appellate jurisdiction where a final judgment or decree has been rendered in causes instituted under that act. *Held*, that the Act of 1915 ingrafts on the Act of 1907 an additional exception, and places ouster proceedings in the class of cases of which the supreme court is given exclusive jurisdiction, and hence the court of civil appeals and its judges are without jurisdiction to hear and determine an appeal, or an appeal in the nature of a writ of error, or to issue writs of *certiorari* and *supersedeas*, or adjudicate the right of a party to such a writ in a suit under the Act of 1915. (*Post*, p. 443.)

Acts cited and construed: Acts 1907, ch. 82, sec. 7; Acts 1915, ch. 11, secs. 9, 13.

2. COURTS. Supreme court. Review of acts of court of civil appeals and judges thereof.

Acts 1907, ch. 82, sec. 8, providing that in all cases within the final jurisdiction of the court of civil appeals the decrees and judgments of such court shall be final, and shall not be reviewed by the supreme court save as therein provided, does not apply to cases outside the jurisdiction of the court of civil appeals, and when that court or one of its judges mistakenly assumes

*As to use of *certiorari* in exercise of superintending control over inferior courts see note in 51 L. R. A., 33.

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jurisdiction the supreme court is not limited to the method prescribed in that act for removing cases from the court of civil appeals for review. (*Post*, p. 446.)

Acts cited and construed: Acts 1907, ch. 82, secs. 7, 8.

Cases cited and approved: *Sharp v. Rose*, 130 Tenn., 228; *Walker v. Lemma*, 129 Tenn., 444.

3. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Statutory provisions.

Acts 1915, ch. 11, sec. 8, provides relative to ouster proceedings that, if defendant shall be found guilty, judgment of ouster shall be rendered against him and he shall be ousted from his office. Section 10 authorizes the court to suspend accused officers from performing the duties of their office pending the final hearing and determination of the matter, but further provides that no person shall be suspended until at least five days' notice of the application for the order of suspension shall be served upon him, that such officer may appear and shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order of suspension, and that when an order of suspension is made the vacancy shall be filled as the law provides for the filling of vacancies in such office. *Held*, that an injunction restraining an officer sought to be ousted from exercising the functions of his office would accomplish the same result as his suspension, and, having been granted without the required notice and hearing, was unauthorized and beyond the power of the trial judge. (*Post*, p. 448.)

Acts cited and construed: Acts 1915, ch. 11, secs. 8, 10.

4. CERTIORARI. Want of excess of jurisdiction. Statutory provisions.

Under Shannon's Code, sec. 4853, providing that the writ of *certiorari* may be granted where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when in the judgment of the court there is no other plain, speedy, or adequate remedy, it is the duty of the supreme court to grant the writ of *certiorari* and *supersedeas* when orders of the court of civil appeals and

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its judges and of the circuit court are beyond the jurisdiction of those courts. (*Post*, p. 450.)

Cases cited and approved: State ex rel. v. Hebert, 127 Tenn., 220; Howell v. Thompson, 130 Tenn., 311.

Code cited and construed: Sec. 4853 (S.).

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—THOS. E. MATTHEWS, Judge.

H. S. STOKES, W. C. CHERRY and J. G. STEPHENSON, for relators.

JNO. T. LELLYETT and FRANK LANGFORD, for defendants.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

In this cause two petition for *certiorari* and *supersedeas* are presented to us. Each of these petitions relates to the same subject-matter, and they can therefore be most conveniently disposed of by a single opinion.

Timothy and others, by their petition, seek to have this court cause to be transferred to its docket the entire record and all proceedings in the cause above styled, to be dealt with by this court according to law.

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The substance of their petition is that, in accord with the provisions of chapter 11, Acts of 1915, they filed in the circuit court of Davidson county a petition before Hon. Thomas E. Matthews, one of the judges of said court, seeking to oust and remove from office J. D. Alexander as commissioner of fire, sprinkling, and building inspection in the municipal government of Nashville, and further seeking to oust and remove from office George W. Stainback as commissioner of streets, sewers, and sidewalks in said municipal government; also seeking an injunction restraining each of said commissioners, as the prayer of the petition sets out, from—

“exercising or attempting to exercise any right, power, or function of or pertaining to their respective offices, in which they seek to elect, or attempt to elect, any person or persons as successor or successors to any office vacated among the commissioners of the said city of Nashville, in any way, manner, or form; that this injunction issue until your honor can hear a motion to suspend the said defendants, and upon said motion being heard, and said defendants being suspended, that said injunction be made perpetual.”

In response to the portion of the prayer for relief above quoted, Judge Matthews issued the following fiat:

“To the Clerk of the Circuit Court at Nashville, Tennessee: Issue the writ of injunction enjoining J. D. Alexander, commissioner of fire and building inspection of the city of Nashville, from exercising, or at-

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tempting to exercise, any right, power or function pertaining to his office as said commissioner, until the further order of this court. Until further advised, I decline to issue the injunction prayed for as to Commissioner Stainback.

“July 29, 1915.

“THOMAS E. MATTHEWS, Judge.”

It is shown by the petition that the foregoing fiat issued by Judge Matthews was superseded by a fiat signed by the Hon. S. F. Wilson, Presiding Justice of the court of civil appeals, upon a petition presented to him in vacation; and at the *supersedeas* issued by Judge Wilson is leveled the petition for *certiorari* and *supersedeas* herein presented by Oliver J. Timothy and others.

The petition for *certiorari* and *supersedeas* by J. D. Alexander is based on the same fiat, issued by Judge Matthews, hereinbefore set out, and seeks to have us issue the writs of *certiorari* and *supersedeas* to bring into this court and supersede the fiat issued by Judge Matthews, and, to that end, that the entire record in this cause be brought into this court, and that his right to such *supersedeas* be disposed of here.

Proceeding now to dispose of these petitions, we observe that by chapter 82 of the Acts of 1907, section 7, it is provided:

“That the jurisdiction of said court of civil appeals shall be appellate only, and shall extend to all cases brought up from courts of equity or chancery courts, except cases in which the amount involved, exclusive of

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costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, State revenue, and ejectment suits, and to all . . . cases tried in the circuit and common-law courts of the State, in which appeals in the nature of writs of error, or writs of error, may be applied for, for the purpose of having the action of said trial court reviewed. In all cases in which appellate jurisdiction is herein conferred upon said court of civil appeals, the appeals and appeals in the nature of writs of error from the lower court shall be taken directly to said court of civil appeals; and said court, or any judge thereof, is hereby given the same power to award and issue writs of error, *certiorari* and *supersedeas*, which the supreme court heretofore had in such cases, returnable to said court of civil appeals. The practice in such cases in said court shall be the same as is now prescribed by law for the supreme court. In all cases in which appellate jurisdiction is not conferred by the terms of this act upon said court of civil appeals, appeals therefrom shall be direct to the supreme court, and in such cases, writs of error, *certiorari*, and *supersedeas* shall be issued by and made returnable to the supreme court, as is now provided by law; and in such cases the supreme court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not, after this act takes effect, assign same for trial by the said court of civil appeals.”

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Section 9 of chapter 11 of the Acts of 1915, commonly known as the Ouster Bill, in the clearest terms vests appellate jurisdiction in the supreme court of this State where a final judgment or decree has been rendered by the circuit court, by the chancery court, or by the criminal court, in a cause instituted under the provisions of that chapter. And this being true, we must read the Act of 1915 and its sections 9 and 13 *in pari materia* with the act of 1907 creating the court of civil appeals, and hold that, in respect of appellate jurisdiction in ouster proceedings, the act of 1915 ingrafted on the act of 1907 an additional exception, and placed ouster proceedings in that class of cases of which by the act of 1907 the supreme court was vested with exclusive jurisdiction, and from this it results that the following quotation from the latter part of section 7 of chapter 82 of the Acts of 1907 has direct application to, and is determinative of, the question of jurisdiction here involved. We requote from the latter part of said section 7 as follows:

“In all cases in which appellate jurisdiction is not conferred by the terms of this act upon said court of civil appeals, appeals therefrom shall be direct to the supreme court, and in such cases, writs of error, *certiorari*, and *supersedeas* shall be issued by and made returnable to the supreme court, as is now provided by law; and in such cases the supreme court shall have exclusive jurisdiction, and shall try and finally determine the same, and shall not, after this act takes effect,

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assign the same for trial by the said court of civil appeals.”

We think the above-quoted part of section 7 of chapter 82 of the Acts of 1907, and section 9 of chapter 11, of the Acts of 1915, clearly demonstrate that the court of civil appeals, and the judges of that court, are wholly without jurisdiction or power to hear and determine an appeal, or an appeal in the nature of a writ of error, or to issue the writs of *certiorari* and *superse-deas*, or adjudicate the right of a party to such a writ or writs, where the predicate of any one of said methods for correction of error is a judgment or decree in a suit brought under the terms of chapter 11 of the Acts of 1915.

But it is said on behalf of Alexander that section 8 of chapter 82, Acts of 1907, provides:

“That in all cases brought up from equity or chancery courts, or from circuit or common-law courts, within the final jurisdiction of the court of civil appeals, as defined in section 7 of this act, the decrees and judgments of said court of civil appeals shall be final, and shall not be reviewed by the supreme court, save as herein provided.”

Wherefore it is urged that, whatever may be the opinion of this court touching the jurisdiction of the court of civil appeals, or one of the judges thereof, to issue the writ of *supersedeas* here involved, the hands of the supreme court are bound by the above-quoted portion of section 8, and by subsequent provisions of that section, prescribing the method by

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which the supreme court may require the removal into it for review a judgment or decree of the court of civil appeals; but our answer to this insistence is that the above-quoted paragraph from section 8 applies in express terms to causes "within the final jurisdiction" of the court of civil appeals, as defined in section 7 of the act, and the last above quoted portion of section 8 does not apply at all to cases which are wholly outside the jurisdiction of the court of civil appeals, and which, by the concluding paragraph of section 7 of the act creating the court of civil appeals, are confided exclusively to the jurisdiction of the supreme court.

The mistaken assumption of jurisdiction of a cause by the court of civil appeals, or one of its judges, certainly does not confer jurisdiction of a cause upon that court, or upon one of its judges; and anything done, either by that court or one of its judges, under a mistaken assumption of jurisdiction over the subject-matter, must be treated in this court, when the question of jurisdiction is here raised, as not having been done. A contrary holding might disable the supreme court from exercising the important and exclusive jurisdiction left in it by chapter 82 of the Acts of 1907.

The case of *Sharp v. Rose*, 130 Tenn. (3 Thomp.), 228, 169 S. W., 765, is not in conflict with our view in the present case, for in that case, as appears from the statement of its facts, the appellate jurisdiction was clearly in the court of civil appeals under the provisions of section 7 of chapter 82 of the Acts of 1907.

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The same observation just above made is true of the case of *Walker v. Lemma et al.*, 129 Tenn. (2 Thomp.), 444, 167 S. W., 474.

The authority of these two cases cannot be doubted; but what was said in each of those cases applies to a state of facts where the appellate jurisdiction of the court of civil appeals was clear under section 7 of chapter 82 of the Acts of 1907, while in this case it is equally clear, that the appellate jurisdiction is in the supreme court. The distinction between those cases and this one is as wide as the poles.

What we have said sufficiently indicates our view of the jurisdictional question, so far as concerns the power of Judge Wilson to supersede the action of Judge Matthews in the ouster proceeding. We think Judge Wilson was wholly without power or jurisdiction to act in the premises.

We next come to a consideration of the power of Judge Matthews to authorize by his fiat the issuance of the injunction against Alexander in the terms set out in the fiat hereinbefore copied.

Chapter 11 of the Acts of 1915, under which Judge Matthews was acting when the fiat in question was granted, does not authorize the trial court in ouster proceedings under that chapter, to grant a fiat for the issuance of an injunction. By its section 10 that chapter confers authority on such court to suspend—
“such officer or officers so accused from performing any of the duties of their offices pending the final hearing and determination of the matter.”

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And by its section 8 that act provides:

“That if the defendant shall be found guilty, judgment of ouster shall be rendered against him, and he shall be ousted from his office.”

But section 10 of the act also provides:

“No person shall be suspended under the provisions of this act until at least five days’ notice of the application for the order of suspension shall be served upon him, which notice shall set forth the time and place of the hearing of said application, and said officer shall have the right to appear and make any defense that he may have, and shall be entitled to a full hearing upon the charges contained in the complaint, and upon the application for the order of suspension; and no order of suspension shall be made except upon finding of good cause therefor. If on the final hearing of the complaint or petition herein provided, the officer is not removed from office, he shall, if he has been suspended, be immediately restored to his office,” etc.

Thus it is obvious, by the terms of the act, that no order of suspension could lawfully have been made in the absence of the notice and the full hearing provided for by section 10 of the act; and it is equally clear that the right so guaranteed to an accused officer, cannot, without violation both of the letter and spirit of the act, be taken away from the officer by the issuance of injunctive process.

The petition against Alexander was filed on July 30, 1915, and the fiat of Judge Matthews is dated July 29, 1915. The injunction authorized by this fiat would

have accomplished the same result, in respect of the discharge by the accused of his official duties prohibited by the terms of the injunction, as would have been produced by a suspension from office. Thus we see the result wrought by the injunction authorized by the fiat is at war with the express letter and spirit of the act, for we find that, by the express terms of the act, when an order of suspension goes down, section 10 of the act provides:

“The vacancy or vacancies shall be filled as the law provides for the filling of vacancies in such office.”

Now, the spirit or purpose of the act is that, though there may be a suspension, yet the municipality shall not be deprived of the benefit of an incumbent of the office legally authorized to discharge its duties, while its former incumbent is disabled therefrom by the judgment of suspension. So the conclusion to which we are driven is that the granting of the fiat for the writ of injunction and the writ issued under the grant were quite clearly beyond any power possessed by the trial judge, and distinctly contrary to the letter and purpose of the act, and consequently void in law.

Section 4853 of Shannon's Code provides:

“The writ of *certiorari* may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.”

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See, also, *State ex rel. v. Hebert*, 127 Tenn. (19 Cates), 220, 154 S. W., 957; *Howell v. Thompson*, 130 Tenn. (3 Thomp.), 311, 170 S. W., 253.

Having reached the foregoing conclusions, it becomes the duty of this court to grant the writ of *certiorari* and *supersedeas* as prayed for in each of the petitions; and the record of the proceedings being now before the court, the injunction, and the fiat authorizing the issuance of the same, are held to be void in law, and of no effect.

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STATE *ex rel.* OLIVER J. TIMOTHY *et al.* v. H. E.
HOWSE *et al.*

(Nashville. Special Term, 1915.)

1. COURTS. Supreme court. Jurisdiction. Ouster suits.

Acts 1907, ch. 82, sec. 7, provides that, in cases in which appellate jurisdiction is not conferred on the court of civil appeals, appeals shall be direct to the supreme court, and writs of error, *certiorari*, and *supersedeas* shall be issued by, and made returnable to, that court, and such court shall have exclusive jurisdiction, and shall try and finally determine all such cases. Ouster Act (Acts 1915, ch. 11), secs. 9, 13, provide that appeals in proceedings instituted thereunder shall lie to the supreme court, where final judgment shall be rendered. *Held*, that the supreme court, and not the court of civil appeals, has jurisdiction to issue writs of *certiorari* and *supersedeas* to review an order suspending a municipal officer from office pending an ouster proceeding, since, when appeals lie to the supreme court, the power to revise, regulate, or review orders, judgments, and decrees by *certiorari* or *supersedeas* is also with that court. (*Post*, p. 455.)

Acts cited and construed: Acts 1907, ch. 82, sec. 7; Acts 1915, ch. 11, secs. 9, 13.

2. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Statutory provisions. "Full hearing."

Ouster Act (Acts 1915, ch. 11), sec. 7, provides that ouster proceedings thereunder shall be summary and triable as equitable actions, regardless of the court in which they are brought. Section 10 authorizes the suspension of the officer sought to be ousted pending the determination of the proceeding, and provides that no person shall be suspended without five days' notice of the application for the order of suspension, and that he shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order of suspension. *Held*, that the "full hearing" provided for is not a "final hearing,"

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but means no more than that the chancellor or trial judge shall give ample opportunity to both sides to make a showing fairly adequate to make manifest the propriety or impropriety of the suspension. (*Post*, p. 456.)

3. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Evidence.

On an application to suspend a municipal officer pending an ouster proceeding against him under Acts 1915, ch. 11, the proof need not be adduced as is done on a formal trial on the merits, but may be introduced by affidavit or otherwise. (*Post*, p. 457.)

Cases cited and approved: *Root v. Mills*, 168 Fed., 688; *Taylor v. Breese*, 163 Fed., 678; *Anderson v. Commonwealth*, 105 Va., 533.

4. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Evidence.

On an application to suspend a municipal officer pending an ouster proceeding against him under Acts 1915, ch. 11, the court did not err in admitting in evidence the transcript of a proceeding pending in the chancery court of the same county, in which the accused officers were sought to be held liable for the same acts, in which transcript were incorporated the depositions of witnesses who had been cross-examined by their counsel. (*Post*, p. 458.)

5. EVIDENCE. Admissions. Depositions.

A deposition of a party was admissible against him, in a proceeding other than that in which it was taken, as an admission under oath. (*Post*, p. 458.)

6. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Evidence.

On an application to suspend a municipal officer pending an ouster proceeding against him, it was the duty of the court to hear the testimony of witnesses produced by such officer, providing their introduction was not carried to a point of manifesting a purpose to delay action on the application for the suspension. (*Post*, p. 458.)

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7. MUNICIPAL CORPORATIONS. Officers. Removal or suspension. Nature of proceeding. "Civil proceeding."

An ouster proceeding against a municipal officer, under Acts 1915, ch. 11, is primarily for the protection of the public, and not to punish the offender, and is civil rather than criminal in nature. (*Post*, p. 459.)

Cases cited and approved: *Territory v. Sanches*, 14 N. M., 493; *Skeen v. Craig*, 31 Utah, 20.

Code cited and construed: Sec. 4853 (S.).

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—THOS. E. MATTHEWS, Judge.

H. S. STOKES, W. C. CHERRY and J. G. STEPHENSON, for relators.

JNO. T. LELLYETT and FRANK LANGFORD, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This case is before us on petition for writs of *certiorari* and *supersedeas* to review the action of Hon. Thos. E. Matthews, circuit judge of Davidson county, in suspending from office petitioners, H. E. Howse and Robert Elliott, mayor and commissioner, respectively, of the city of Nashville.

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This suspension was ordered by the circuit judge in a proceeding begun by petition of accusation filed by ten or more taxpayers and freeholders of the city under the provisions of Acts 1915, chapter 11, commonly known as the Ouster Act, in which Howse and Elliott are charged with acts of malfeasance and illegal conduct in their respective offices.

After hearing the petition of accusation and ouster and certain proof tendered as by way of affidavits and as documentary evidence of admissions of record made by one of the accused officials under oath, the trial judge entered an order suspending the officials.

The petition filed before us challenges the constitutionality of the Ouster Act, but in the argument of the case at the bar of this court the constitutional questions were not debated, but were passed over with the statement of counsel of petitioners that it was not his purpose to argue same. We therefore treat the act as constitutional, so far as it is thus challenged.

Arising, then, for consideration as a preliminary question, is whether this court, or the court of civil appeals, has jurisdiction where writs of *certiorari* and *supersedeas* are sought in a case such as this. We are of the opinion that the jurisdiction to entertain the petition for such writs is with this court.

By sections 9 and 13 of the Ouster Act it is provided that appeals in proceedings instituted thereunder shall lie to the supreme court, where final judgment shall be rendered, and in cases when appeals are provided by law to lie to this court we hold that the power to

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revise, regulate, or review orders, judgments, and decrees of circuit and chancery courts by *certiorari* or *supersedeas* is with this court. Acts 1907, ch. 82, sec. 7.

The main contention of the petitioning officials is that the order of the court below suspending them was not rendered after a "full hearing" upon the charges contained in the petition of accusation. This insistence is predicated upon section 10 of the Ouster Act, which provides that no person shall be suspended without five days' notice of the application for the order of suspension, and "said officer shall have the right to appear and make any defense that he may have and shall be entitled to a full hearing upon the charges," etc.

By the terms of an earlier section (7) of the act it is provided that "the proceedings in ouster shall be summary and triable as an equitable action," regardless of the court in which the same are begun. The act draws a clear distinction between ouster on final hearing and a suspension on full hearing pending a final hearing, and we are of opinion that the order of suspension is properly to be likened to the interlocutory orders entered in the usual equity proceeding, such as decretal orders for the appointment of a receiver, or for injunctive process. The suspension is to be by "order," and clearly to be differentiated from the final decree of ouster. The argument is advanced by counsel of the petitioners that an order of suspension cannot properly be entered until the

full or entire proof is adduced by both the movants or applicants and themselves. If maintainable, this would put it in the power of the accused officials to delay a suspension until the court had before it all the proof requisite to decreeing on final hearing; that is, proof which would support a decree for an outright ouster from office.

It cannot be that the legislature did not have in mind the difference between interlocutory relief by order and relief on final hearing in equitable proceedings, when it thus provided for the character of the proceeding in detail. As applied to proceedings that look to interlocutory relief in an order to be entered, a "hearing," or "full hearing," provided for by legislative act, does not, it must be conceded, mean "final hearing." It means, in the terminology of the law of equity practice, the hearing of a motion, or "application," as the act now under construction phrases it, for interlocutory relief. The expression "full hearing" means no more than that the chancellor, or trial judge exercising the powers of a chancellor, shall give ample opportunity to both sides to make a showing fairly adequate to make manifest the propriety or impropriety of the step asked to be taken by him.

Touching the character of the proof, we are of opinion that it need not necessarily be adduced as is done on a formal trial on the merits. In matters interlocutory in character a hearing means "the introduction of evidence thereon by affidavit or other-

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wise, the argument of solicitors, and the order of the chancellor." *Root v. Mills*, 168 Fed., 688, 94 C. C. A., 174; *Taylor v. Breese*, 163 Fed., 678, 90 C. C. A., 558; *Anderson v. Commonwealth*, 105 Va., 533, 54 S. E., 305.

The circuit judge admitted and considered a transcript of a proceeding pending at the time in another court, the chancery court of Davidson county, to which the accused officials were parties and sought to be held liable for the same acts. In that transcript were incorporated the depositions of witnesses who had been cross-examined by their counsel. These were considered as of the nature of affidavits by the trial judge. In addition there was so incorporated a deposition of Mayor Howse, which was clearly competent as an admission under oath. We think there was no error in this.

The counsel of the petitioning officers of the city did not offer their clients as witnesses, nor did they offer any witnesses for examination. They did offer a bit of documentary evidence, which was admitted and considered by the court. If the hearing lacked anything of being full, this was not attributable to the trial judge, so far as this record indicates.

Had the defendants tendered testimony of witnesses, doubtless the circuit judge would have heard them, as it was his duty to do, provided their introduction was not carried to a point of manifesting a purpose to delay action on the application for a suspension—a preliminary proceeding of the character we have already indicated.

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Counsel for the defendant officials urge upon us the view that a proceeding under this Ouster Act is criminal or quasi criminal in character. Similar acts have been passed by the legislatures of several States, and have been construed by the courts to provide a remedy civil in character.

By these modern statutes, which make no provision for fine or punishment of any kind, the proceeding is plainly intended to rid the public of an unworthy servant, and is in this particular entirely different from common-law proceedings criminal in nature.

The proceeding is primarily for the protection of the public, and not to punish the defendant as an offender, and it is civil rather than criminal in nature. *Territory v. Sanches*, 14 N. M., 493, 94 Pac., 954, 20 Ann. Cas., 109, and note; *Skeen v. Craig*, 31 Utah, 20, 86 Pac., 487.

It is urged that the act is not retroactive, and that the circuit judge should not have heard evidence touching, or have considered, any act of the officers proceeded against that antedated the passage of the act. We are of the opinion, however, that the circuit judge properly held that the act undertook to make nothing illegal that was not illegal before the act's passage, and that the act is merely remedial in nature, and that it only provides a new remedy.

We are of the further opinion that no sufficient showing is made by the petition and its exhibits for writs of *certiorari* and *supersedeas* under Code (Shannon) section 4853; and they are denied the petitioners.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

B. F. MARR v. FRANK MURPHY.

(Knoxville. September Term, 1915.)

1. EXTORTION. Official fees. Penalties.

Under Shannon's Code, secs. 6352, 6353, prohibiting officers from demanding or receiving fees other than expressly provided by law, and declaring that, if an officer demands or receives any other or higher fee than prescribed, he shall be liable for a penalty, an officer who receives a fee to which he is not entitled is liable to a penalty, though the fee was voluntarily paid; this being particularly true in view of section 6714, governing extortion, which makes guilt depend upon the demanding and receiving of a greater fee than is allowed. (*Post*, p. 463.)

Cases cited and approved: *Leggatt v. Prideaux*, 16 Mont., 205; *State v. Coleman*, 116 Am. St. Rep., 446.

Code cited and construed: Secs. 6352, 6353, 6714 (S.).

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2. EXTORTION. Official fees. Penalties.

Where a justice of the peace received a fee for issuing a criminal warrant before it was due, he is liable to the penalty provided by Shannon's Code, sec. 6353, for the receiving or demanding of any other or higher fee than that prescribed; such fee not being prescribed. (*Post*, p. 464.)

Case cited and approved: *State v. Cooper*, 120 Tenn., 549.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—L. D. SMITH, Special Judge.

CHAS. M. ROBERTS and WM. MEYERHOFF, for plaintiff.

J. R. PENLAND and JAS. G. JOHNSON, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

Murphy, a justice of the peace of Knox county, was sued by Marr for a penalty of \$50 for extortion in the taking from Marr of the sum of fifty cents for and at the time of the issuance of a criminal warrant sued out on the affidavit of Marr as prosecutor. The predicate for the liability of the officer is not that the sum was one in excess of what the law allowed, but that it was taken by him before it was due or collectible according to statute, in that by statute only

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on the contingency that the prosecution was frivolous or malicious could Marr, as prosecutor, be held liable for the fee at all, and such could only be determined in the judgment to be rendered after trial on the warrant.

The special judge trying the case in the circuit court in a written finding of facts held the defendant officer not liable. He gave credence to the testimony of the officer, who was on all material points contradicted by Marr, so that the correctness of the judgment may be tested by the testimony of the defendant in his own behalf.

The pertinent portions of that proof are as follows:

“Plaintiff, Marr, came to my office to secure a State warrant against Tom Hillard for a felony. I wrote out the warrant, and plaintiff signed it as prosecutor. I then completed the warrant by signing my name thereto in my official capacity. When I had completed said warrant, and had folded the same up, plaintiff asked me what it was worth—‘twenty-five cents’? I said, ‘Fifty cents for a State warrant and twenty-five for a civil warrant.’ Thereupon plaintiff paid me fifty cents for issuing this warrant, which I accepted. . . . I deny that I had demanded of plaintiff fifty cents for issuing the warrant.”

Defendant further claims in his testimony that he told plaintiff, when the latter left the office with the warrant, that if the warrant was returned before him the cost would be taxed, and that plaintiff could get his money back. Defendant admitted that plaintiff

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did come back to his office two or three days later, and stated that the constable did not serve the warrant, because defendant had collected fifty cents from plaintiff for issuing this warrant. Defendant, however, denied that plaintiff on this occasion demanded his fifty cents back. Defendant also stated that he never mentioned money to plaintiff, or even thought of any charge for the warrant, until the plaintiff mentioned and offered the fifty cents to him; that the defendant only took the fifty cents on the ground that plaintiff offered it to him, for the reason that the paper was to be executed and returned before another justice of the peace, if at all; and that the payment of the fifty cents by plaintiff was voluntary, and not demanded or suggested on the part of defendant.

The trial judge held that the defendant was not liable for the penalty, on the ground that the payment had not been demanded of the prosecutor, and that as the same was volunteered by the latter, and merely received by the officer, there was no liability.

The statutory provisions governing this action are found in Shannon's Code, secs. 6352, 6353, which provide that no officer is allowed to demand or receive fees, or other compensation, for any service further than is expressly provided by law, and (section 6353) that, if any officer demands or receives any other or higher fees than are prescribed by law, he is liable to the party aggrieved in a penalty of \$50.

It is observed that between the word "demand" and the word "receive" there appears the disjunctive

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“or,” and we are of opinion that, so far as a civil action for the prescribed penalty is concerned, there need not be a precedent demand to the receipt of fees, where unwarrantably collected. This is made the more obvious when we look to the criminal statute governing extortion (Shanon’s Code, sec. 6714), where guilt is made to depend upon the officer “demanding and receiving” a greater fee or compensation than is allowed. The distinction thus taken between the civil and the criminal action is made in other jurisdictions. *Leggatt v. Prideaux*, 16 Mont., 205, 40 Pac., 377, 50 Am. St. Rep., 498, and note to *State v. Coleman*, 116 Am. St. Rep., 446, 452.

The judgment of the circuit court was reversed by the court of civil appeals, though that court was divided in opinion.

The minority of the court of civil appeals did not follow the reasoning of the trial judge on the above point, but held the view that:

“Section 6353 does not apply to the collection of a lawful fee before it is due. It does not apply to the case of collecting a lawful fee, or, in other words, the amount fixed by statute as the fee, before it is due; and the collection of fifty cents for the issuance of a criminal warrant is certainly not a higher fee than is prescribed by law for that service, and we think it cannot by any kind of construction be said to be any other fee.”

It was held in *State v. Cooper*, 120 Tenn., 549, 113 S. W., 1048, 15 Ann. Cas., 1118, that the collection

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of a fee before it became due was punishable criminally; and we think it fairly manifest that section 6353, by the phrase "any other fees than are prescribed by law," covers fees that may be for the lawful amount, provided the same be collected before due, according to law. It cannot be that the legislature meant to prescribe a criminal punishment and withhold the less onerous civil remedy for such collection of a fee before due.

The law does not prescribe or provide for the payment of the fee by a prosecutor in advance, and therefore the justice received a fee other than prescribed by law. It was received and settled for as if it were one prescribed by law for a State warrant, to be paid for on issuance, and plaintiff, Marr, must have so understood. The justice knew that any offer to pay was on that basis, and that the payment actually made was under a misconception on the part of the plaintiff, in part induced by the justice.

Agreeing with the views of the majority of the court of civil appeals, the judgment is affirmed; the writ of *certiorari* having been heretofore granted.

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KITTIE S. FERRIS v. DAVID H. BLOOM.

(Knoxville. September Term, 1915.)

1. JURY. Jury trial. Waiver. "Civil suit."

Shannon's Code, sec. 3912, providing that the issue of *devisavit vel non* shall be tried by jury, was enacted prior to Acts 1875, ch. 4, as amended by Acts 1889, ch. 220 (Shannon's Code, secs. 4611-4616), providing that failure to demand a jury in the method provided should constitute a waiver of the right to jury trial. *Held*, that, as the legislature must have known that an issue *devisavit vel non* was a civil suit, the subsequent acts apply to trial of that issue, and a contestant's failure to demand a jury trial is a waiver of the right. (*Post*, p. 467.)

Acts cited and construed: Acts 1875, ch. 4; Acts 1889, ch. 220.

Cases cited and approved: *Swink v. McKnight's Executors*, 88 Tenn., 765; *Cheatham v. Pearce & Ryan*, 89 Tenn., 668; *Worthington v. Railroad*, 114 Tenn., 177; *Garrison v. Hollins, Burton & Co.*, 70 Tenn., 684; *Coulter v. Sewing Machine Co.*, 71 Tenn., 115; *Railroad v. Foster*, 78 Tenn., 351; *McGuire v. Railroad*, 95 Tenn., 707; *Warren v. Grocery Co.*, 96 Tenn., 574; *Casey, etc., Mfg. Co. v. Weatherly*, 97 Tenn., 297.

Code cited and construed: Secs. 3912, 4611-4616 (S.).

2. JURY. Right to jury. "Cases triable by jury."

Acts 1875, ch. 4, as amended by Acts 1889, ch. 220 (Shannon's Code, secs. 4611-4616), providing that in cases "triable by jury" a demand shall be necessary, applies not only to cases where jury trial was permissive, but where it had heretofore been imperative; neither Const., art. 1, sec. 6, declaring that right of trial by jury shall remain inviolate, nor Const. U. S. Amend. 7, declaring that it should be preserved, prohibiting waiver of jury trial. (*Post*, p. 469.)

Acts cited and construed: Acts 1875 and 1889.

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Cases cited and approved: Garrison v. Hollins, Burton & Co., 70 Tenn., 684; McGuire v. Railroad, 95 Tenn., 707; Warren v. Grocery Co., 96 Tenn., 574; In re Pittsburg, 243 Pa., 392; Indianapolis N. T. Co. v. Brennan, 174 Ind., 1.

Code cited and construed: Sec. 3912 (S.).

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—NATHAN L. BACHMAN, Judge.

LITTLETON, LITTLETON & LITTLETON, for contestant.

SIZER, CHAMBLISS & CHAMBLISS, for proponent.

MR. JUSTICE BUCHANAN delivered the opinion of the Court.

This is a contested will suit. The only question for decision is whether the parties waived a jury trial of the issues made up in the circuit court. That court tried the issues without a jury, and sustained the will. The ruling of the circuit judge was that the parties had waived a jury trial. The court of civil appeals, in an opinion by Mr. Justice Higgins, affirmed the judgment, and contestant presents the question to us by her petition for *certiorari*.

It is not insisted that either party made a demand for a jury trial of the issue in the manner prescribed

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by chapter 4, Acts of 1875, as amended by chapter 220 of the Acts of 1889 (Shan. Code, sections 4611-4616, inclusive). Contestant insists that such demand was not necessary to be made, basing this insistence upon section 3912, Shannon Code 1896, which provides that "the issue shall be tried by a jury," meaning the issue *devisavit vel non*. Proponent insists that the act of 1875 and the act of 1889 were subsequent in date of passage to the statute (section 3912, *supra*), and that the legislature in the passage of the subsequent acts intended them to apply to issues *devisavit vel non*.

Beyond all doubt, such an issue was a civil suit, triable by jury when our jury statutes above named were passed. The first of those statutes, in express terms, applies to any civil suit, and the second to all civil suits triable by jury. We must ascribe to the legislature the knowledge that an issue *devisavit vel non* was a civil suit triable by jury, and it follows as a conclusion entirely reasonable that the legislation includes such issues along with other civil suits triable by jury, and imposes on parties to such issues the duty of making a demand for a jury trial in the manner required by the acts.

It is manifest, without authority, that the two acts should be construed together; but the point has been expressly ruled in *Swink v. McKnight's Executors*, 88 Tenn. (4 Pick.), 765, 14 S. W., 311. The terms of these jury acts indicate their application to the trial of issues of fact in courts of chancery; but a contrary ruling on this point, based upon sound reason, has been

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made. *Cheatham v. Pearce & Ryan*, 89 Henn. (5 Pick.), 668, 15 S. W., 1080; *Worthington v. Railroad*, 114 Tenn. (6 Cates), 177, 86 S. W., 307, 4 Ann. Cas., 1002, and note.

We see no reason to support the view that the statutes in question were not intended to apply to issues *devisavit vel non* which might not as well support a similar view as to other civil suits in which the statutes have been held to apply. *Garrison v. Hollins*, *Burton & Co.*, 70 Tenn. (2 Lea), 684; *Coulter v. Sewing Machine Co.*, 71 Tenn. (3 Lea), 115; *Railroad v. Foster*, 78 Tenn. (10 Lea), 351; *McGuire v. Railroad*, 95 Tenn. (11 Pick.), 707, 33 S. W., 724; *Warren v. Grocery Co.*, 96 Tenn. (12 Pick.), 574, 36 S. W., 383; *Casey, etc., Mfg. Co. v. Weatherly*, 97 Tenn. (13 Pick.), 297, 37 S. W., 6.

Contestant insists that the words "triable by jury," as used in the acts, should be held to apply only to cases where a jury trial was "permissible," and not to cases where such a trial was "imperative," under a statute such as section 3912, Shannon Code. This argument is without merit. Under our constitution, where the right to trial by a jury exists, whether it be declared by the imperative terms of a statute or not, the right is protected by article 1, section 6, of that instrument, which declares "the right of trial by jury shall remain inviolate." The permanency of the right depends upon the constitution. If the right rested alone in the statute, the legislature could by a subsequent statute mod-

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ify or altogether destroy the right, according to its will. It has long been settled that the acts of 1875 and 1889 do not violate the right of trial by jury, nor contravene the provision of the constitution above set out. Indeed, it has been said that the right to trial by jury is carefully secured by these acts to the citizen on his demand, and the public policy underlying the acts has been distinctly approved. *Garrison v. Hollins, Burton & Co.*, 70 Tenn. (2 Lea), 684; *McGuire v. Railroad*, 95 Tenn. (11 Pick.), 707, 33 S. W., 724; *Warren v. Grocery Co.*, 96 Tenn. (12 Pick.), 574, 36 S. W., 383. The seventh amendment of the constitution of the United States provides:

“In suits at common law, where the value in controversy shall exceed twenty dollars (\$20), the right of trial by jury shall be preserved,” etc.

But the supreme court of the United States has uniformly held that the right may be waived in such actions. See cases cited in Encyc. Digest U. S. Supreme Court Reports, vol. 7, p. 762, note 95. The right to trial by jury in a contested will case may be waived. 40 Cyc., p. 1320; Pritchard on Wills and Administration, section 366. A party may waive his right of trial by jury during the pendency of proceedings in the cause by conduct inconsistent with the exercise of such right. *In re Pittsburg*, 243 Pa., 392, 90 Atl., 329, 52 L. R. A. (N. S.), 262; *Indianapolis N. T. Co. v. Brennan*, 174 Ind., 1, 87 N. E., 215, 90 N. E., 65, 68, 91 N. E., 503, 30 L. R. A. (N. S.), 85.

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The act of 1875, after prescribing the manner in which a demand for a trial by jury shall be made, further provides:

“And a failure to demand a jury as aforesaid shall be deemed and held conclusively an agreement of the parties to submit all issues and questions of fact to the decision of the judge without a jury.”

The act of 1889 provides:

“And unless such demand is made, and entry thereof on the trial docket, it shall be the duty of the court to try the case without a jury.”

There was no error in the judgment of the court of civil appeals, and it is accordingly affirmed.

Ingle System Co. v. Norris & Hall.

INGLE SYSTEM CO. v. NORRIS & HALL.

(Knoxville. September Term, 1915.)

1. CORPORATIONS. Corporate existence. Right to deny.

When a private person enters into a contract with a purported corporation, he thereby admits the existence of a corporation; and hence, if the payee of a note is described by a corporate name, the maker is estopped to deny the corporate existence. (*Post*, p. 474.)

Cases cited and approved: Welland Canal Co. v. Hathaway, 8 Wend., 480; Williams v. Michigan Bank, 7 Wend., 539; Holloway v. Memphis, etc., R. R. Co., 23 Tex., 465; U. S. Express Co. v. Bedbury, 34 Ill., 459; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo., 101; Barbaro v. Occidental Grove No. 16, 4 Mo. App., 429; Harris v. Muskingum Mfg. Co., 4 Blackf. (Ind.), 267; Bennington Iron Co. v. Rutherford, 18 N. J. Law, 107; Weller v. Davis & Sanford Co., 15 Ga. App., 79.

2. CORPORATIONS. Corporate existence. Estoppel to deny.

Where a note was made payable to the Ingle System Company, and there was nothing else to show the nature of the company, the payee is estopped to deny the company's corporate existence, for it may be assumed that such company was a corporation; the name not being particularly applicable to a firm. (*Post*, p. 474.)

FROM McMINN.

Appeal from the Circuit Court of McMinn County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals, to the Supreme Court.—
SAM C. BROWN, Judge.

Ingle System Co. v. Norris & Hall.

D. S. STUART, for plaintiff.

O. W. WELLS, for defendant.

MR. JUSTICE FANCHER delivered the opinion of the Court.

This suit was instituted before a justice of the peace of McMinn county by the Ingle System Company, averred in the warrant to be a corporation organized under the laws of the State of Ohio, against defendants, Norris & Hall, to recover on an installment note executed by Norris & Hall to the Ingle System Company. Judgment was rendered by the justice in favor of the plaintiff for the amount due on the note.

Defendants appealed to the circuit court of McMinn county, where a written plea was filed by them, averring that:

“The plaintiff is not now and never has been a corporation under the laws of Ohio, as in plaintiff’s warrant alleged.”

Plaintiff’s attorney moved to strike this plea from the files for several reasons, which were overruled by the court, and issue was taken on the plea.

At the conclusion of the proof introduced by the plaintiff, the defendants moved the court to direct the jury to return a verdict in their favor, which motion was sustained by the court. After motion for a new trial the plaintiff appealed in error to the court of civil appeals, where the judgment of the circuit court was reversed, and judgment entered for the amount due on the note and all costs in the case.

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The case is before this court by a writ of *certiorari*. The sole question necessary to be here decided is whether the plea of *nul tiel* corporation is to be sustained. The note or contract on which suit was brought does not show on its face, unless it be by inference, that the Ingle System Company is a corporation, and no proof was introduced before the court to show that fact, other than the introduction of the note or contract. The concern is simply referred to in the contract by the name of the Ingle System Company.

While as against the State a corporation cannot be created by the mere agreement or other act or admission of private persons, yet as between private litigants they may, by their agreements, admissions, or conduct, place themselves where they would not be permitted to deny the fact of the existence of the corporation. When a private person enters into a contract with a body purporting to be a corporation, in which that body is described by the corporate name which it has assumed, such private person thereby admits the existence of the corporation for the purposes of the suit brought to enforce the obligations, and will not be permitted to deny the corporate existence of the plaintiff. 10 Cyc., 244, 245; Morawetz on Private Corporations, sec. 774. Many cases are cited on this proposition by the above authorities.

While the above proposition does not seem to be disputed by any authority, there is a division of opinion as to whether the existence of a private cor-

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poration is imported by its name. A few courts have held that in order to raise this presumption, or make out a *prima facie* case by contracting with the assumed corporation, that the fact of its incorporation must be stated in the contract. *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.), 480, 24 Am. Dec., 51; *Williams v. Michigan Bank*, 7 Wend. (N. Y.), 539; *Holloway v. Memphis, etc., R. R. Co.*, 23 Tex., 465, 76 Am. Dec., 68.

But the more general statement of the rule, and that which is sustained by the weight of authority, is that one who executes a written obligation to an obligee by a name which is not descriptive of a firm of individuals, but one which imports that it is a corporation, is by that fact estopped in an action thereon to deny the corporate existence of the payee, or perhaps, more properly speaking, the form of name which would be assumed to be a corporation is said to imply that it is a corporation, and the mere introduction of the obligation as evidence will make out a *prima facie* case that the contract is with a corporation. *U. S. Express Company v. Bedbury*, 34 Ill., 459; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo., 101; *Barbaro v. Occidental Grove*, No. 16, 4 Mo. App., 429; *Harris v. Muskingum Mfg. Co.*, 4 Blackf. (Ind.), 267, 29 Am. Dec., 372; *Bennington Iron Co. v. Rutherford*, 18 N. J. Law, 107, 35 Am. Dec., 528; *Weller v. Davis & Sanford Co.*, 15 Ga. App., 79, 82 S. E., 593. In these cases such names as the following were held to imply a corporation:

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“Missouri City Savings Bank;” “Muskegon Manufacturing Company;” “Davis & Sanford Company;” “Bennington Iron Company.”

The name “Ingle System Company” does not indicate that it is a firm of individuals. While it is not a conclusive fact, yet it may be fairly assumed as a presumption from the name of the company that it is a corporation, especially at this time, when corporations form so large a part of the concerns engaged in business, and especially among those doing an interstate business, as it appears this concern is doing.

The result reached by the court of civil appeals was therefore correct, and the judgment is affirmed.

C., N. O. & T. P. R. Co. v. Brock.

CINCINNATI, N. O. & T. P. R. Co. v. BROCK.*

(Knoxville. September Term, 1915.)

1. RAILROADS. Injuries to persons on tracks. Duty of care. Burden of proof.

Under Shannon's Code, sec. 1574, subd. 4, declaring that every railroad company shall keep a lookout, and, when any person or other obstruction appears on the track, take all means to prevent an accident, and section 1576, declaring that no railroad company that observes such precautions shall be responsible for damage done to persons on its road, one suing for the death of her intestate, killed on defendant's road, has the burden of showing that such intestate was on or so near the track as to be an obstruction before the railroad company is bound to show that it observed the statutory precautions. (*Post*, p. 478.)

Case cited and approved: Virginia, etc., R. Co. v. Hawk, 160 Fed., 348.

Code cited and construed. Sec. 1574, subsec. 4; sec. 1576 (S.).

2. CERTIORARI. Review. Questions presented.

Where a judgment for plaintiff was reversed by the court of civil appeals, and the defendant did not by its own petition and assignment of error present for review by the supreme court the holding that the denial of its motion for a peremptory instruction was not error, the question is not open to review on *certiorari* brought by plaintiff. (*Post*, p. 480.)

Case cited and construed: Knight v. Cooley, 131 Tenn., 21.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from

*Generally as to duty of railroad to maintain lookout on track see notes in 25 L. R. A., 287, 8 L. R. A. (N. S.), 1069, 41 L. R. A. (N. S.), 264.

the Court of Civil Appeals to the Supreme Court.—
NATHAN L. BACHMAN, Judge.

M. N. WHITAKER, for plaintiff.

ALLISON, LYNCH & PHILLIPS, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an action to recover for the death of plaintiff's intestate on the track of the railway company, by reason of a claimed violation of statutory regulations on the part of defendant.

Subsection 4 of section 1574 of Shannon's Code, upon which the action is based, is as follows:

“Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.”

Section 1576 provides:

“No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company.”

One of the questions to be herein dealt with is as to the correctness of the charge of the trial judge on the

point of where lies the burden of proof to show that the deceased appeared on the track, or within striking distance of the track, as an obstruction.

The trial judge gave the jury instruction as follows:

“If you find that the deceased was killed (and the defendant admits that), then you will inquire whether or not the defendant, the railroad company, did what the law required it to do. If it shows you by the greater weight of the evidence that it did, that it had some one on the lookout on the engine, and this man at the time he appeared in the vision of the engineer was not in striking distance of the train, then there was no duty that devolved upon the engineer to sound an alarm or put down the brakes.”

The court of civil appeals held this to be error, and properly so. By this charge, both the parties concede, the burden was placed on the defendant railway company in that regard; whereas, the burden of proof was on the plaintiff to show that the deceased appeared upon the track, or was so near to it as to be an obstruction. Until this was done there was not made the *prima facie* case that would place, in turn, upon the defendant the burden of showing that its employees had observed the prescribed statutory precautions of sounding the whistle, etc.

The point was so ruled in a case, arising in this State and the action based on the above statute, by the circuit court of appeals for the sixth circuit. *Virginia, etc., R. Co. v. Hawk*, 160 Fed., 348, 87 C. C. A., 300.

The railway company attempts to call in question the holding of the court of civil appeals that its motion for a peremptory instruction to the jury to return a verdict of nonliability was not sustainable; but we are not called upon to pass on that question, since the railway company as the successful party in that court has not by its own petition and assignment of errors brought that particular ruling before us for review, as it might have done. The only petition filed is that of the plaintiff, challenging the ruling of the court of civil appeals on the charge of the circuit judge adverse to her. *Knight v. Cooley*, 131 Tenn., 21, 173 S. W., 435.

Without expressing any view upon the soundness of the decision on that particular point, the judgment of reversal rendered by the court of civil appeals is affirmed in the respects indicated by a memorandum or judgment handed down herewith.

Nixon Mining Drill Co. v. Burk.

NIXON MINING DRILL CO. v. W. H. BURK *et al.*

(Knoxville. September Term, 1915.)

PRINCIPAL AND AGENT. Authority of agent. Warranties.

An agent, empowered to sell personal property, has implied power to make such warranties as the law would imply, had the same been made by the principal direct, and as are usual in sales of like property. But an agent, authorized to sell a motor truck, has no implied authority to warrant that the tires would last a given length of time while carrying an excess load; such warranties not being usual.

Cases cited and distinguished: Ezell v. Franklin, 34 Tenn., 236; Lipscomb v. Kitrell, 30 Tenn., 260.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County—W. B. GARVIN, Chancellor.

SIZER, CHAMBLISS & CHAMBLISS, for appellant.

MOORE & DARWIN, for appellees.

MR. SPECIAL JUSTICE FRANTZ delivered the opinion of the Court.

This suit originated in the chancery court of Hamilton county, Tennessee, and is a suit to recover upon warranty alleged to have been made in the sale of a motor truck, made by W. H. Burk to the complainant.

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The truck belonged to the defendant S. W. Milne, and Burk was his agent, appointed by written authority, for the sale of said truck. The warranty alleged to have been made and to have been breached was that the tires upon the truck would run for eight thousand miles and carry a fifty per cent. excess load; that is to say, the truck had a rated capacity of three tons, and it is claimed that the warranty was that the tires would run for eight thousand miles while carrying an excess capacity of one and one-half tons. The authority of the agent was simply an authority to sell at a specified price, and the question involved is whether the authority to sell conferred the authority to bind his principal by the aforesaid warranty.

The chancellor held Burk individually liable upon said warranty. He appealed, but has assigned no errors, and upon motion of the complainant the decree as to him is affirmed. The chancellor decreed against the contention of complainant with respect to the defendant Milne, holding him not liable in said warranty, and complainant has appealed from that part of the decree.

Several questions are presented, but it will not be necessary, in our view of the case, to consider but one: Does an agent, upon whom has been conferred authority to sell personal property, have implied authority to make on behalf of his principal this character of warranty? The rule of law applicable is thus stated in Mechem on Agency (2d Ed.), page 631:

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“Authority to warrant quality may be, and in a constantly increasing mass of cases is, deduced from the fact that the same or similar articles are usually sold with such a warranty. In this respect it may be said to be the rule that authority conferred upon an agent, whether general or special, to sell personal property, carries with it, in the absence of countervailing circumstances known to the person with whom he deals, implied authority to make, in the name of the principal, such a warranty of the quality and condition of the property sold as is usually and ordinarily made in like sales of similar property at that time and place.”

Further, on page 632, same volume, it is said:

“It has, moreover, been declared in several cases that, if the sale is one in which had it been made by the principal in person, the law would imply a warranty; e. g., a warranty of fitness for the contemplated use, an express warranty to the same effect, given by the agent, must be deemed to be within the scope of his implied authority.”

The rule is thus stated in 31 Cyc., p. 1353:

“The rule which is supported by the more numerous and more recent decisions is that if, in the sale of that kind or class of goods which the agent is empowered to sell, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law presumes that he has such authority, and that, if an agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a description

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not usually sold with warranty. There are cases, however, which lay down a broader rule, and hold that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears.”

The author cites *Ezell v. Franklin*, 2 Sneed, 236, as supporting what he calls the “broader rule.”

An examination of *Ezell v. Franklin*, supra, in connection with the previous case of *Lipscomb v. Kitrell*, 11 Humph., 260, shows that Tennessee is in line with the decisions supporting what is given by the author as the “general rule,” rather than the “broader rule” referred to by him.

In *Lipscomb v. Kitrell*, supra, the court was dealing with a case where an agent had been authorized to sell judgments, and in making the sale had guaranteed their payment. The court said:

“It has been earnestly contended that the court erred in telling the jury that if the defendant was an agent to sell the claims, and no more, and he then made a warranty of them, he alone would be liable. It is insisted that an agency to sell confers on the agent the incidental power to warrant the thing sold. We do not think this principle has application to the case before us. As a general proposition, it is true that, when an agency is created to do a thing, the power is incidentally conferred to do such other things as may be necessary for carrying into effect the objects of the agency. And if an agency exists, in any trade or business, the custom of which is to exercise certain powers

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in carrying the agency into effect, then the creation of the agency confers the right on the part of the agent to act in reference thereto, *according to such custom.*”

In the later case of *Ezell v. Franklin*, supra, the agent had been given authority to sell a slave, and in making the sale warranted the slave to be sound and healthy, a slave for life, title good, etc. The court held that the agent had implied authority to make the warranty, but specifically referred to and approved *Lipscomb v. Kitrell*, supra; the court saying with respect to this case:

“The case of *Lipscomb v. Kitrell*, 11 Humph., 260, cited and relied upon by the counsel for Franklin, does not conflict with this doctrine, but rather confirms, by an express acknowledgment of it. The court there, in effect, admit the general principle ‘that an agency to sell confers on the agent the incidental power to warrant the thing sold,’ but say that it had no application to the case then under consideration, as it surely had not.”

Reading this case, therefore, in the light of the previous case, we are of the opinion that it is in line with the authorities already quoted from.

We think the true rule is that an agent upon whom authority has been conferred to sell personal property has implied authority from his principal to make such warranties in respect thereto as the law would imply, had the sale been made by the principal direct, and, in addition, has implied authority to make in the name of the principal such warranty of the quality and con-

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dition of the property sold as is usually and customarily made in like sales of similar property at that time and place.

In the case under consideration it is not claimed that it was usual or customary in the trade for agents to make this character of warranty with respect to motor trucks; indeed, it clearly appears from the record that it was not customary to make such warranties. It therefore follows that the agent had no authority to make the warranty in question in the name of the principal.

The decree of the chancellor is affirmed.

Knoxville Ry. & Light Co. v. Vangilder.

KNOXVILLE RY. & LIGHT CO. v. VANGILDER.

SAME v. VANGILDER *et ux.**

(Knoxville. September Term, 1915.)

1. HIGHWAYS. Automobile accident. Obstructions. Contributory negligence.

A person who drove an automobile at night in a dark place on the highway so fast that he could not avoid an obstruction within the distance lighted by his lamps was guilty of contributory negligence, barring his recovery, though just before the accident the bright lights of an approaching automobile and a curve where his own light did not shine directly in the way the machine was going hindered him from seeing the obstruction. (*Post*, p. 491.)

Case cited and approved: *West Construction Co. v. White*, 130 Tenn., 520.

2. NEGLIGENCE. Imputed negligence. Automobile accident. Husband and wife.

The negligence of the driver of an automobile, in consequence of which the machine ran into an obstruction negligently left at the roadside by defendant, was not imputable to his wife, who was riding with him, so as to bar her right to recover for her own injuries, where it did not appear that the danger was obvious or known to her, and that she did not rely on the assumption that her husband would exercise care and caution. (*Post*, p. 492.)

Cases cited and approved: *Turnpike Co. v. Yates*, 108 Tenn., 429; *McFadden v. Santa Ana, etc., R. Co.*, 87 Cal., 464; *Peck v. New*

*As to imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury see note in L. R. A., 1915B, 953.

Imputing negligence of one spouse to the other is discussed in notes in 14 L. R. A., 733, 8 L. R. A. (N. S.), 656.

As to the question of contributory negligence under particular state of facts see note in 1 L. R. A. (N. S.), 228.

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York, etc., R. Co., 50 Conn., 379; Penn. R. R. Co. v. Goodenough, 55 N. J. Law, 577; Gulf etc., Co. v. Greenlee, 62 Tex., 344; Huntoon v. Trumbull (C. C.), 12 Fed., 844; Morris v. C., M. & St. P. R. Co. (C. C.), 26 Fed., 22; Yahn v. Ottumwa, 60 Iowa, 429; Prideaux v. Mineral Point, 43 Wis., 513; Carlisle v. Sheldon, 38 Vt., 440; Joliet v. Seward, 86 Ill., 402; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex., 643; Thorogood v. Bryan, 8 C. B., 115; Dale v. Denver City Tramway Co., 173 Fed., 787; Cotton v. Willmar, etc., R. R. Co., 99 Minn., 366; Turnpike Co. v. Yates, 108 Tenn., 428; Koehler v. Miller, 21 Ill. App., 557; L., etc., R. Co. v. Creek, 130 Ind., 139; Miller v. L., etc., R. Co., 128 Ind., 97; Bailey v. Centerville, 115 Iowa, 271; Street v. Holyoke, 105 Mass., 82; Hedges v. Kansas City, 18 Mo. App., 62; Flori v. St. Louis, 3 Mo. App., 231; Platz v. Cohoes, 24 Hun (N. Y.), 101; Shaw v. Craft (C. C.), 37 Fed., 317; Sheffield v. Central Union Tel. Co. (C. C.), 36 Fed., 164; Davis v. Guarnieri, 45 Ohio St., 470; Hoag v. N. Y. Central, etc., R. Co., 111 N. Y., 199; So. R. Co. v. King, 128 Ga., 383; Teal v. St. Paul City R. Co., 96 Minn., 379; Dudley v. Peoria R. Co., 153 Ill. App., 624; N. Y., etc., R. Co. v. Robbins, 38 Ind. App., 172; Sheffield v. Central Union Tel. Co. (C. C.), 36 Fed., 164; Chicago, etc., R. R. Co. v. Spilker, 134 Ind., 380; Reading Tp. v. Telfer, 57 Kan., 798; Denton v. Mo., etc., R. R. Co., 90 Kan., 51; Lammers v. Gt. Nor. R. Co., 82 Minn., 120; Finley v. Chicago, etc., R. Co., 71 Minn., 471; Hennessy v. Brooklyn City R. Co., 73 Hun, 569; Louisville, etc., R. R. Co. v. McCarthy, 129 Ky., 821; Williams v. Withington, 88 Kan., 809; Basler v. Sacramento Gas Co., etc., 158 Cal., 514; Hampel v. Detroit, etc., R. R. Co., 138 Mich., 1; Schultz v. Old Colony St. R. Co., 193 Mass., 309; Colorado, etc., R. Co. v. Thomas, 3 Colo., 517.

3. HUSBAND AND WIFE. Action by married woman. Parties. Joinder of husband.

In a married woman's action for injuries received in an automobile accident, which occurred after the passage of Married Women's Act, February 20, 1913 (Acts 1913, ch. 26), by which married women are given the right to sue in their own names, the joinder of the husband as a party plaintiff was unnecessary. (*Post*, p. 499.)

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Acts cited and construed: Acts 1913, ch. 26.

Code cited and construed: Secs. 4248, 4249 (S.).

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—VON. A. HUFFAKER, Judge.

A. C. GRIMM, for plaintiffs.

SHIELDS & CATES and J. HARRY PRICE, for defendant.

MR. JUSTICE FANCHER delivered the opinion of the Court.

These two suits were tried together in the lower court and in the court of civil appeals, resulting in a verdict and judgment in favor of W. A. Vangilder for the sum of \$125, and in favor of himself and wife for \$250, against the defendant, Knoxville Railway & Light Company.

The cases are now before this court by writ of *certiorari*, and plaintiff in error seeks to reverse the decree of the court of civil appeals affirming the judgments.

The suit of Vangilder is for personal injuries to himself, and the suit of himself and wife is for personal injuries to his wife. They were out on the road together in an automobile, which was being operated by Mr. Vangilder. They had proceeded out on the Kingston pike, which runs from Knoxville, by Lyons

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View, a distance of about two and one-half miles, had turned around, and were returning to the city, when suddenly, and as they were turning a curve in the road, a large automobile with very bright lights came into view, which lights so blinded Mr. Vangilder that he could not see well. He was running upon the right-hand side of the road, and the other automobile was also running upon its right-hand side of the road, as they approached. Just after the two machines had passed each other Mr. Vangilder ran into some barrels, pots, and metal containers left on the edge of the pike by plaintiff in error, resulting in injury to his machine and personal injuries to himself and wife. The turnpike had been coated with a substance called tarvia, which was used as a binder and coating on the macadam. The car track of plaintiff in error was along the side of the pike, there being about eighteen inches of space between it and the edge of the coating of tarvia on the pike. Plaintiff in error had some men coating this small strip of roadway between the pike proper and its car track. The tarvia was in barrels. Pots were used to heat the tarvia, and metal containers with wheels were used to convey it from the pots to the space where it was to be applied. These things were on the inside of this curve close up to the railway, and Mr. and Mrs. Vangilder did not observe any light, and in fact they testify that there was no light burning at the place where they ran into the containers, barrels, etc. The Railway & Light Company introduced evidence tending to show that the

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evening before lights had been placed upon the barrels all along; but if this had been done at this particular point, the lights had evidently gone out, and we must assume in favor of the finding of the trial judge, sitting without the intervention of a jury, that there was negligence in the placing of these containers, etc., and leaving them there on the roadway without being properly lighted.

But it is stated that there was contributory negligence upon the part of Vangilder in running his machine at such speed that he was unable to stop it before running into these containers, etc., which will bar the right of recovery as to both Vangilder and wife. Mr. Vangilder testified that he was only running at the rate of twelve or fourteen miles per hour, and he and his wife testified that they were blinded by the extraordinarily bright lights on the other automobile as they were passing it and that the lights from their own machine were directed on account of the curve toward the outside of the road, so they could not see where they were driving. They testified, also, that they did not discover the obstructions until they were within a few feet of them, and that they then were so close to the obstructions that it was impossible for Mr. Vangilder to stop the machine in time to prevent the accident.

It is insisted on behalf of defendants in error that they were excused from the rule established by this court in the case of *West Construction Company v. White*, 130 Tenn., 520, 172 S. W., 301. In that case

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it was held that, where a person drives an automobile at night in a dark place so fast that he cannot stop or avoid an obstruction within the distance lighted by his lamps, he is guilty of contributory negligence which will bar his recovery. That case held that this was true, although the defendant was guilty of negligence in leaving an unlighted obstruction in a public thoroughfare.

We see no distinction that can be drawn in this case differentiating it from the case of *West Construction Company v. White*.. The fact that the bright light from the large automobile was shining in the face of Vangilder, and that he was turning a curve where his own light did not shine directly in the way his machine was going around the curve, was a greater reason that he should have stopped or slowed up his machine, so as to avoid running into a place of danger.

We therefore hold that the contributory negligence of Vangilder was such as to defeat his right of recovery, and the case is reversed and suit dismissed so far as his recovery is concerned.

But a more difficult question is presented as to the recovery of Mrs. Vangilder. It is said that, inasmuch as she was not guilty of any contributory negligence, that the contributory negligence of her husband cannot be attributed to her.

It has been held in this State that, where a person while riding in the carriage of another by invitation is injured by the negligence of a third party, he may recover against the latter, notwithstanding the negli-

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gence of the owner of the carriage in driving his team may have contributed to the injury, where the injured person is without fault and had no authority over the driver. *Turnpike Company v. Yates*, 108 Tenn., 429, 67 S. W., 69. It is stated that upon the principles announced in that case Mrs. Vangilder should also be excused from any contributory negligence of her husband in driving the automobile, for the reason that she had no control over him and was guilty of no contributory negligence. This presents a proposition which we are not advised has been heretofore directly determined in Tennessee; at least, we do not find any adjudication upon the question in any of our reported cases.

In other States there is a division of opinion. There are a number of decisions which maintain that the contributory negligence of the husband in such case will be attributed to the wife. Among these cases are the following: *McFadden v. Santa Ana, etc., R. Co.*, 87 Cal., 464, 25 Pac., 681, 11 L. R. A., 252; *Peck v. New York, etc., R. Co.*, 50 Conn., 379; *Penn. R. R. Co. v. Goodenough*, 55 N. J. Law, 577, 28 Atl., 3, 22 L. R. A., 460; *Gulf, etc., Co. v. Greenlee*, 62 Tex., 344; *Huntoon v. Trumbull* (C. C.), 12 Fed., 844, 2 McCrary, 314; *Morris v. Chicago, M. & St. P. R. Co.* (C. C.), 26 Fed., 22; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W., 257; *Prideaux v. Mineral Point*, 43 Wis., 513, 28 Am. Rep., 558; *Carlisle v. Sheldon*, 38 Vt., 440; *Joliet v. Seward*, 86 Ill., 402, 29 Am. Rep., 35.

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In *Gulf, etc., Co. v. Greenlee*, supra, the court did not discuss the relationship of the parties as husband and wife. In a later Texas case it was held that, although the negligence of the driver in attempting to cross a railway track is not attributable to his wife while riding with him, she will be held to the duty of exercising ordinary care. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex., 643, 11 S. W., 127.

In *Huntoon v. Trumbull*, supra, the husband's knowledge of the vicious character of a horse, which ran away, was declared the knowledge of the wife, who was injured while riding with him, but the relationship of husband and wife was not mentioned as an element in the case.

In *McFadden v. Santa Ana, etc., R. Co.*, supra, the holding is based upon the ground that under the law in California the right of damages for injury to the wife while riding with her husband is community property, and the right being joint the contributory negligence of the husband will bar the joint right of action for negligence of a third party.

In *Pa. Ry. Company v. Goodenough*, supra, the court held that the common-law rule is in force in New Jersey and reinforced by the practice act of that State; the husband has not only the right to sue for the wife for personal injuries, but has a power coupled with an interest in the suit, having the right to release and compromise the case, and it is upon the ground of this joint action and his power over the suit and interest in it that the negligence of the husband will defeat

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the right of action for injuries to the wife. There is a strong dissenting opinion in the *Goodenough Case*.

In *Carlisle v. Sheldon*, *Peck v. New York, etc., R. R. Co.*, *Joliet v. Seward*, and *Yahn v. Ottumwa*, supra, it was held that, while the negligence of the husband driving would be imputed to the wife riding with him, it was on the relation of driver and passenger, and not that of husband and wife. In *Carlisle v. Sheldon*, it was said:

“The wife stands in no different position . . . from that which she would occupy if the driver of the vehicle in which she was riding had been some one employed for that purpose, instead of her husband.”

It will be observed that in a number of these cases holding that the wife must answer for the contributory negligence of her husband it was upon the ground that any person riding with another, thereby placing himself or herself within the care of the driver, must be answerable for the neglect or failure of the one driving. That doctrine has not been adhered to in this State, but we have adopted in Tennessee what is now considered the majority holding, as is pointed out in *West Construction Company v. White*, supra.

The rule that the occupant of a vehicle will be imputed with the negligence of the driver has for its basis the leading case of *Thorogood v. Bryan*, 8 C. B., 115; but the authority of that case has often been denied in other jurisdictions and was overruled finally by the English courts. *The Bernina*, L. R. 12 Prob.

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Div., 58. The doctrine of *Thorogood v. Bryan* has now been quite generally discarded as unsound, and the negligence of the chauffeur or driver of an automobile or carriage is not imputable to the person riding in the vehicle. *Dale v. Denver City Tramway Co.*, 173 Fed., 787, 97 C. C. A., 511, 19 Ann. Cas., 1223; *Cotton v. Willmar, etc., R. R. Co.*, 99 Minn., 366, 109 N. W., 835, 8 L. R. A. (N. S.), 643, 116 Am. St. Rep., 422, 9 Ann. Cas., 935; *Turnpike Co. v. Yates*, 108 Tenn., 428, 67 S. W., 69.

The better rule in cases of husband and wife, and the one now most generally accepted by the courts, is that the negligence of the husband cannot be imputed to the wife to prevent recovery by her for injuries she has received. 1 Thompson on Neg., sec. 504; *Koehler v. Miller*, 21 Ill. App., 557; *L., etc., R. Co. v. Creek*, 130 Ind., 139, 29 N. E., 481, 14 L. R. A., 733; *Miller v. L., etc., R. Co.*, 128 Ind., 97, 27 N. E., 339, 25 Am. St. Rep., 416; *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W., 379; *Street v. Holyoke*, 105 Mass., 82, 7 Am. Rep., 500; *Hedges v. Kansas City*, 18 Mo. App., 62; *Flori v. St. Louis*, 3 Mo. App., 231; *Platz v. Cohoes*, 24 Hun (N. Y.), 101, affirmed in 89 N. Y., 219, 42 Am. Rep., 286; *Shaw v. Craft* (C. C.), 37 Fed., 317; *Sheffield v. Central Union Tel. Co.* (C. C.), 36 Fed., 164; *Davis v. Guarneri*, 45 Ohio St., 470, 15 N. E., 350, 4 Am. St. Rep., 548; *Hoag v. N. Y. Central, etc., R. Co.*, 111 N. Y., 199, 18 N. E., 648; *So. R. Co. v. King*, 128 Ga., 383, 57 S. E., 687, 11 L. R. A. (N. S.), 829, 119 Am. St. Rep., 390; *Teal v. St. Paul City R. Co.*, 96 Minn., 379,

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104 N. W., 945; *Dudley v. Peoria R. Co.*, 153 Ill. App., 624; *N. Y., etc., R. Co. v. Robbins*, 38 Ind. App., 172, 76 N. E., 804; *Sheffield v. Central Union Tel. Co.* (C. C.), 36 Fed., 164; *Chicago, etc., R. R. Co. v. Spilker*, 134 Ind., 380, 33 N. E., 280, 34 N. E., 218; *Reading Tp. v. Telfer*, 57 Kan., 798, 48 Pac., 134, 57 Am. St. Rep., 355; *Denton v. Missouri, etc., R. R. Co.*, 90 Kan., 51, 133 Pac., 558, 47 L. R. A. (N. S.), 820, Ann. Cas., 1915B, 639; *Lammers v. Gt., Nor. R. Co.*, 82 Minn., 120, 84 N. W., 728; *Finley v. Chicago, etc., R. Co.*, 71 Minn., 471, 74 N. W., 174; *Hennesy v. Brooklyn City R. Co.*, 73 Hun, 569, 26 N. Y. Supp., 321; *Louisville, etc., R. R. Co. v. McCarthy*, 129 Ky., 821, 112 S. W., 925, 19 L. R. A. (N. S.), 230, 130 Am. St. Rep., 494; *Williams v. Withington*, 88 Kan., 809, 129 Pac., 1148; note to *Basler v. Sacramento Gas Co., etc.*, 158 Cal., 514, 111 Pac., 530, Ann. Cas., 1912A, 647; *Hampel v. Detroit, etc., R. R. Co.*, 138 Mich., 1, 100 N. W., 1002, 110 Am. St. Rep., 286.

In *Platz v. Cohoes*, supra, the negligence of the husband, who was driving the carriage, was held not imputable to his wife, who was injured while riding with him under circumstances quite similar to the present case. A number of these cases are directly in point.

We see no reason why the negligence of the husband should be attributable to the wife under the circumstances in this case. The reasoning applied in cases holding that the negligence of the driver will be imputed to the rider in some instances was that the

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driver was the servant of the one riding with him and under the control of the master. That is undoubtedly a sound distinction, where the one driving is under the control of another person and is only carrying out that person's orders, and the one riding in such case should be held chargeable with the negligence of his servant. This distinction, however, cannot apply as between husband and wife, because the wife has not that direction and control, and is not chargeable with the manner of driving, or in directing how the driving shall be done, as appears in the cases referred to. It is not supposed that the wife has charge over matters of this kind. She rather relies upon her husband, and trusts to his guidance and protection. If he blunders, why should she be chargeable, when she is without fault?

Of course, if an adult, who while riding in a vehicle driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so is negligence. Ordinarily, however, a driver is intrusted with caring for the safety of a carriage and its occupants, and unless the danger is obvious, or is known to the passenger, he may rely upon the assumption that the driver will exercise proper care and caution. *Schultz v. Old Colony St. R. Co.*, 193 Mass., 309, 79 N. E., 873, 8 L. R. A. (N. S.), 597, 118 Am. St. Rep., 502, 9 Ann.

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Cas., 402; *Colorado, etc., R. Co v. Thomas*, 3 Colo., 517, 81 Pac., 801, 70 L. R. A., 681, 3 Ann. Cas. 700.

We think this rule that the rider should exercise diligence when proper to do so would also devolve upon the wife riding with her husband. If the wife should see a danger not apparent to the husband, or observe that he was about to run into danger, it would be her duty to notify him, or else she would be chargeable with neglect of her own safety, which in some cases might bar her right of recovery for injuries received.

But in the present case there was nothing that the wife could have done in the emergency presented which would have altered the situation, trusting as she was to her husband's guiding the car in safety, and we think that his negligence cannot be imputed to her under these circumstances.

We might further add that in this State the husband cannot dismiss the suit in the name of husband and wife for any cause without the consent of the wife in writing, and then only in term time. Shannon's Code, secs. 4248, 4249. There is no such interest of the husband in the recovery in this State, or in the control over the litigation, as would bring the case within the reasoning applied in the *Pa. R. Co. v. Goodenough Case*. In this State the recovery is distinctly that of the wife, and the husband cannot control the litigation. It has been proper heretofore for the husband to join in the action according to the rules of common law. This suit, however, was brought after the passage of the Married Women's act of February

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20, 1913, which emancipates married women from the disabilities of coverture and gives them the right to sue in their own names went into effect. Acts 1913, ch. 26.

The joinder of the husband was therefore unnecessary.

The case will be affirmed as to the recovery of Mrs. Vangilder.

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J. L. DANIEL *et al.* v. DAYTON COAL & IRON CO., LIMITED.

(*Knoxville*. September Term, 1915.)

1. PUBLIC LANDS. Transfer of land grant. Registration. Presumption.

Where a copy of what appeared to be a registration of an original land grant was introduced in evidence in ejectment, and immediately following it appeared a transfer executed by the grantee of the land therein described, the position of the transfer on the registration book following the grant indicated that it was a transfer of the land written on the back of the original grant. (*Post*, p. 504.)

Case cited and approved: *De Garmo v. Prater*, 125 Tenn., 497.

2. ACKNOWLEDGMENT. Defects. Cure by registration deeds.

Under Shannon's Code, secs. 3761, 3762, relating, respectively, to presumptions on registration twenty years old and on registration thirty years old, the fact that a deed had been registered since December 24, 1834, cured any defects in the acknowledgment thereof. (*Post*, pp. 504, 505.)

Code cited and construed: Secs. 3761, 3762 (S.).

3. PUBLIC LANDS. Registration. Transfer of land grant.

Where the custom then in force required that grants of land from the State be recorded by the register of the land office before delivery to the grantees, a grant had necessarily been recorded prior to January 23, 1833, when a transfer thereof was indorsed on the back of the grant; and hence a notation appearing on the record, reading "Registered December 24, 1834," necessarily referred to the registration of the transfer, rather than of the grant. (*Post*, pp. 505, 506.)

4. ESTOPPEL. Provisions of will. Ejectment.

A provision of a will bequeathing to testator's children "the proceeds of the sale of land in Tennessee lately bought by me

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that may remain there and uncollected at the time, of my decease," and a provision of a codicil stating that "respecting Tennessee lands I refer solely to the unpaid purchase money," were too uncertain to establish a conveyance of the land, or to estop the heirs from asserting title in ejectment, especially where the lands in controversy were bought by testator twenty-four years before execution of the will, and the evidence was not conclusive whether testator owned other lands in Tennessee. (*Post*, pp. 506, 507.)

5. FRAUDS, STATUTE OF. Parol sale. Renunciation. Ejectment.

The action of the vendor's heirs in bringing ejectment for the land is a sufficient renunciation of a parol voidable sale thereof. (*Post*, p. 507.)

Case cited and approved: *Vaughn v. Vaughn*, 100 Tenn., 285.

6. ESTOPPEL. Elements. Recitals of will. Ejectment.

A recital in a will that testator owns no lands in the State will not estop his heirs from asserting title to lands as having belonged to him, where defendant has in no way acted on such recitals. (*Post*, pp. 507, 508.)

Cases cited and approved: *Smith v. Cross*, 125 Tenn., 159; *Tate v. Tate*, 126 Tenn., 171.

7. EJECTMENT. Right of action. Parties. Power of sale.

A provision of a will authorizing testator's executors to sell and convey his realty, being but a power of sale, did not vest title in his executors, so as to preclude his heirs from suing to recover the land. (*Post*, pp. 508, 509.)

Case cited and distinguished: *Rogers v. Marker*, 59 Tenn., 645.

8. ADVERSE POSSESSION. Use and occupation. Sufficiency.

The maintaining for more than seven years of a small pen in the woods, about thirty-five by forty feet, which was never cleared or cultivated, being a mere illusory possession, from which the owner might reasonably conclude that there was no intention to claim title, was not such a use and occupation as would give title to a large tract of land under the statute

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of limitations; it being essential that the use be such as the land is reasonably susceptible of, and that it be obvious, open, and notorious, and indicate an intention to use the land as owner. (*Post*, pp. 509, 510.)

Cases cited and approved: *King v. Mabry*, 71 Tenn., 241; *Coal Co. v. Coppinger*, 95 Tenn., 526.

9. **ADVERSE POSSESSION.** Use and occupation. Inclosure.

Title in defendant by adverse possession could not be predicated on a possession within the boundary of a tract of land owned by defendant and interlapping the land in controversy, where defendant's inclosure was not within the interlap. (*Post*, p. 510.)

10. **ADVERSE POSSESSION.** Possession within interlap. Superior title.

A possession within such interlap, but on a tract of land to which there was a title superior to that under which plaintiff claimed, could not be adverse to plaintiff's title. (*Post*, p. 510.)

11. **ADVERSE POSSESSION.** Possession by third person. Sufficiency of evidence.

Evidence in ejectment, wherein defendant company claimed title by adverse possession, *held* not to show that the possession of a third person was held and claimed as a possession for defendant for a sufficient length of time to vest title in defendant. (*Post*, pp. 510-512.)

FROM RHEA.

Appeal from the Chancery Court of Rhea County.—
JAMES M. TRIMBLE, Special Chancellor.

MILLER & SWAFFORD, for appellant.

J. L. DANIEL, J. L. GODSEY and SPEARS & LYNCH, for appellees.

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MR. JUSTICE FANCHER delivered the opinion of the Court.

This is an action of ejectment. Complainants are the heirs and devisees of Appollos Woodward, and sue to recover 5,000 acres of land embraced in grant No. 2751, issued by the State of Tennessee to Jeremiah Church, November 19, 1832, calling to lie in Bledsoe county, Tenn., but in reality also situated partly in Rhea county. Complainants introduced as evidence a copy of this grant from the books of the land office where the original was registered, and next a copy from the register's office of Bledsoe county of what appears to be a registration of the original grant, and immediately following it appears a transfer executed by Jeremiah Church to Appollos Woodward, January 23, 1833, of the land within described. Its position on the registration book following the grant indicates that it was a transfer of the land written upon the back of the original grant. *De Garmo v. Prater*, 125 Tenn., 497, 146 S. W., 144, Ann. Cas., 1913C, 346. No objection appears to have been made at the time this instrument was offered in evidence, but it is now insisted that the instrument is not sufficiently verified to operate as a conveyance of land, because it is not acknowledged or proven in accordance with the laws of Tennessee; the acknowledgment being defective.

Without going into the law in force at that time, to see if the acknowledgment was in proper form, we find that the deed has been registered since December 24,

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1834, in the proper county, and this cures any defect that may exist. Shannon's Code, secs. 3761, 3762.

It is stated by defendant that there is nothing to show when the transfer was registered, and that the notation appearing on the record, "Registered December 24, 1834," refers to a registration by R. Nelson, register of the land office where the grant was recorded, and is a notation of the date of the registration of the grant and not of the deed. This cannot be true. According to the custom then in force, the grant was made out from the plat and certificate of survey, and transmitted from the land office to the governor and secretary of State, where it was executed by the governor and attested by the secretary of State, attaching the great seal of the State, and was then returned to the register of the land office and by him recorded, and then turned over to the grantee or some person for him.

We must conclude that this grant had come to the hands of Jeremiah Church when this assignment or transfer was made, from the fact that it was evidently written on the back of the grant. We must therefore conclude that the grant had been recorded by R. Nelson, register of the Mountain district, prior to January 23, 1833, when the transfer was made on the back of the grant. The notation of R. Nelson does not show the date, but shows the book and page where registered. Immediately following the notation of R. Nelson, is found the further notation: "Registered December 24, 1834." This last notation was evidently the date of

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the registration of the deed indorsed by the register of deeds at Pikeville, and was probably written on the back of the grant following the notation of R. Nelson.

Another question presented by the defendant is that Appollos Woodward in his will and codicil thereto shows that he had previously conveyed this land. The will contains the following sections:

“XIII. I give and bequeath to my children, to wit, Peter V. Woodward, Mary W. Grafius, Jno. V. Woodward, Margaret H. Covert, Jos. Woodward and Agnes D. Oliver, children of my first wife, the proceeds of the sale of land in Tennessee lately bought by me that may remain there and uncollected at the time of my decease.”

In a codicil to the will appears the following:

“In section XIII respecting Tennessee lands, I refer solely to the unpaid purchase money at this time, not intending to include payment of \$1,000 received by me in other property, and which property is disposed of in my general estate by other parts of this will. All other bequests except Tennessee lands to remain precisely as expressed in said (13) section.”

The insistence is that complainants are estopped by these recitals in the will of Appollos Woodward, their ancestor, that Appollos Woodward did not own any other lands in Tennessee, and that the recitals must refer to this particular land. The testimony shows that only three or four counties have been looked to for records of other deeds to him, and, further, that

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his descendants did not know of any other land owned by him in Tennessee. This is not sufficiently conclusive as to whether he owned other lands in this State. Both he and Church were residents of Pennsylvania. He may have owned other lands in Tennessee that his descendants did not know anything about. He died soon after the execution of his will, which was in 1857.

In the will of Appollos Woodward, he refers to land in Tennessee lately bought by him. It was twenty-four years after the execution of the deed by Jeremiah Church until the will was executed. It is not at all clear that he would be referring to this land as being lately bought by him when it had been twenty-four years since the purchase. Furthermore, the recitals do not show that Appollos Woodward had ever conveyed his Tennessee land. It does not show the name of any grantee. He may have sold the land, intending only to execute a deed in the event the purchaser paid the purchase price, which he indicates was not paid. If a parol sale was made by Appollos Woodward of these particular lands the action of his heirs in setting up claim thereto in this suit is sufficient renunciation of the parol sale, which is voidable. *Vaughn v. Vaughn*, 100 Tenn., 285, 45 S. W., 677.

But if it be conceded that the will can only have reference to this particular land, there is nothing therein stated which will estop these complainants from asserting title under the well known rules of estoppel. The defendant did not act upon the faith of these recitals in the will in any way; it did not purchase any

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claim to the land on the faith of these statements, and is not prejudiced thereby. It is an entire stranger to, and is neither a party or privy, and can be neither bound nor aided by, the instrument or any representations therein. So no element of estoppel can arise in favor of defendant. Pomeroy's Eq. Jur., sec. 813; *Smith v. Cross*, 125 Tenn., 159, 140 S. W., 1060; *Tate v. Tate*, 126 Tenn., 171, 148 S. W., 1042.

The recitations in the will, therefore, are entirely too meager and uncertain to establish a conveyance of the land, or to prevent the heirs by estoppel from asserting title in ejectment.

Another assignment of error is that no recovery can be had, because this title was vested under the will of Appollos Woodward in his executors. The language of the will upon this subject relied upon for this position of defendant is as follows:

"I hereby authorize and empower my executors, or the survivor of them, to sell and convey all the rest and residue of my real estate wherever situated not hereinbefore specifically devised, at such time and on such terms and conditions as they may think most advantageous to those interested, and to execute and deliver to the purchaser deed conveying same in fee simple."

This is but a power of sale in the executors. It is not a devise to the executors. The distinction is clearly drawn in a number of our Tennessee authorities upon the subject, and especially is it well settled in *Rogers v. Marker*, 12 Heisk., 645, that there is a distinction be-

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tween a devise to executors to sell and a power of sale. A power in the executors to convey land does not necessarily require that the title be vested in them for that purpose, and there is no attempt in the clause of the will above copied to vest an estate in the executors. It is well settled in *Rogers v. Marker*, that:

“A devise to executors to sell vests title; but a devise that the executors shall sell land, or that it shall be sold by them, gives but a power to sell.”

The last assignment of error relied upon is as to the sufficiency of certain inclosures and improvements to effect a bar of the statute of limitations against complainants. One inclosure relied upon by the defendant, and maintained by it for a period of over seven years, was a small pen in the woods, about thirty-five by forty feet in dimensions, which was never cleared or cultivated. This might be termed an illusory possession. The owner of the land, observing it, might reasonably conclude that it was a stock pen used by some person grazing stock upon the land, without intention of claiming title. It is not a use and occupation of the land, such as should be required in order to take land from one person under the statute and give it to another.

It is well settled in this State that to effect a bar of the statute there must be some use and occupation of the land which will indicate an intention by some one to use the land as an owner. To indicate this it should be some use of which, from the nature and character of the land, it is reasonably susceptible, and this should

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be obvious, open, and notorious. *King v. Mabry*, 3 Lea, 241; *Coal Co. v. Coppinger*, 95 Tenn., 526, 32 S. W., 465.

Another possession relied upon is within the boundary of a tract of land owned or claimed by the defendant, which interlaps with the Church grant; but the inclosure is not within the interlap. Defendant's claim within the interlap being inferior, such possession clearly would not be adverse to complainants.

Another possession is within the interlap, but is on a tract of land which is an older and superior title to the Jeremiah Church tract, and hence cannot be adverse to the title held under the Church grant.

Another inclosure relied upon consisted of some five or six acres of an inclosure which extended over the line of a ten-acre tract. This ten-acre tract is called the Pat Schoolfield tract, and is a superior title to the Church grant. One John King purchased the ten acres and built a house and inclosed some land; part of the inclosure being within his ten acres, but a portion of same, consisting of about five or six acres, extending over the line. It is shown that this inclosure over the line was maintained for over seven years, but the proof is not clear that it was held and claimed as a possession for the Dayton Coal & Iron Company. On the contrary, it distinctly appears that it was not relied upon by the company as a possession for it. There is some proof introduced tending to show that a surveyor named Schenck, working for the Dayton Coal & Iron Company, had a conversation with King about the time

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the latter constructed this inclosure, agreeing that he might do so, and that King should also look after other lands of the company in that vicinity. However, this testimony is not without serious doubt.

The proof indicates that at a later date, after Schenck had ceased to be an employee of the Dayton Coal & Iron Company, another man, looking after the land of the company, discovered the inclosure of King over his line, and objected to it, and demanded of King that he draw in his fencing, so that none of it would be upon the land of the Dayton Coal & Iron Company. King complied with this demand and drew in his inclosures. In doing so, however, he still left something like one-half an acre of the inclosure across the line, and his house was also over the line. At a later date it appears that the Dayton Coal & Iron Company brought suit against King and other defendants, alleging that they were trespassing upon the land and adversely in possession thereof, seeking to eject them and to enjoin the cutting of timber and other trespasses. King left the place about this time.

From the whole proof we are satisfied that the Dayton Coal & Iron Company did not for a sufficient time recognize King as its tenant, or rely upon his inclosure across the line under any lease or tenancy with it. Whatever may have been the understanding with Schenck, it is not clear that the officers and agents of the company relied upon any agreement that Schenck had made creating a lease or tenancy of this land. Moreover, it is not clear that any particular portion

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of land was intended to be held by King for the Dayton Coal & Iron Company, and from the nature of the inclosure and the attendant circumstances, considering the unsatisfactory nature of the proof, we are unable to say that there was sufficient notoriety to this holding.

For the reasons here indicated, and others that might be mentioned, we hold that there was no sufficient adverse possession of this land by the Dayton Coal & Iron Company, or in its behalf, to bar the title of the true owners. There is, upon the whole case, no reversible error.

The decree of the chancellor will be affirmed in all respects.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION
JACKSON, APRIL TERM, 1915.

W. L. PUCKETT *et ux.* v. ROBERT WYNNS *et al.**

(*Jackson.* April Term, 1915.)

1. EXECUTORS AND ADMINISTRATORS. Sales. Petition for sale.

Under Shannon's Code, sec. 4000, providing that where an administrator has exhausted the personal estate in the payment of debts, leaving just debts unpaid or paid by the representative out of his own means, land belonging to deceased may be sold to satisfy such debts, and section 4001, providing that before decreeing such sale it shall appear that the personal estate has been exhausted in the payment of *bona fide* debts, and that the debts for which the sale is sought are justly due and owing, either to creditors or the representative, an administrator's petition for such a sale is not insufficient to give jurisdiction, where it alleges the total amount of indebtedness, although it

*Presumption as to jurisdiction when record shows defence is discussed in note in 1 L. R. A. (N. S.), 740.

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does not name the creditors, nor set forth the nature and amount of each. (*Post*, pp. 518, 519.)

Code cited and construed: Secs. 4000, 4001, 4002 (S.).

2. EXECUTORS AND ADMINISTRATORS. Sale of land. County court. Jurisdiction.

Under Shannon's Code, secs. 6028, 6071, 6112, conferring concurrent jurisdiction upon the chancery, circuit, and county courts to sell real estate of decedents and for distribution or partition, the county court has concurrent jurisdiction with the circuit and chancery courts of a proceeding to sell a decedent's real estate for the payment of debts due to creditors or to the representative. (*Post*, pp. 519-522.)

Cases cited and approved: *Kindell v. Titus*, 56 Tenn., 727; *Pea v. Waggoner*, 6 Tenn., 242; *Starkey v. Hammer*, 60 Tenn., 441; *Dulles v. Read*, 14 Tenn., 53.

Code cited and construed: Secs. 6028, 6071, 6112 (S.).

3. INFANTS. Judgment. Collateral attack. Judgments impeachable.

Where the court has jurisdiction of the parties and the subject-matter of litigation upon pleadings putting in issue the matter adjudicated, the decree cannot be attacked collaterally, and is binding upon minors as well as adults. (*Post*, pp. 522, 523.)

Cases cited and approved: *Wilson v. Schaefer*, 107 Tenn., 330; *Hurt v. Long*, 90 Tenn., 445; *Robertson v. Winchester*, 85 Tenn., 171; *Pope v. Harrison*, 84 Tenn., 82.

4. JUDGMENT. Collateral attack. Grounds.

Upon collateral attack upon a judgment or decree of a court of general jurisdiction by parties or privies thereof, such judgment or decree cannot be questioned, except for want of authority over the matter adjudicated, which want of authority must appear from the record itself. (*Post*, p. 523.)

Case cited and approved: *Wilkins v. McCorkle*, 112 Tenn., 707.

5. JUDGMENT. Collateral attack. Presumption of jurisdiction.

On collateral attack on a judgment or decree, it is conclusively presumed, in the absence of a contrary showing on the record,

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that the court had power to determine the question involved, and the evidence on which the court acted cannot be considered. (*Post*, p. 523.)

6. EXECUTORS AND ADMINISTRATORS. Sale of land. Sufficiency of complaint.

Where the petition for an administrator's sale did not set out the individual debts and the names of the creditors, the insufficiency was waived by failure to make objection. (*Post*, pp. 523, 524.)

7. EXECUTORS AND ADMINISTRATORS. Sales. Preliminaries.

Failure to make a report to the clerk of the court of an administrator's sale to pay debts did not invalidate the sale, since it must be assumed that the court had necessary proofs to establish the facts set forth in the decree of sale. (*Post*, pp. 524, 525.)

Case cited and approved: *Bloom v. Cate*, 75 Tenn., 471.

8. EXECUTORS AND ADMINISTRATORS. Sales. Preliminaries.

That the administrator, petitioning for leave to sell land to pay debts, made no inventory of the estate and no publication for creditors, none of whom were joined, did not invalidate the decree, since such matters were not essential thereto. (*Post*, pp. 525, 526.)

Code cited and construed: Secs. 4067, 4068, 4078 (S.).

FROM HENRY.

Appeal from the Chancery Court of Henry County.
—J. W. Ross, Chancellor.

TAYLOR & HUDSON, for appellants.

LAMB & FITZHUGH, for appellees.

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MR. JUSTICE FANCHER delivered the opinion of the Court.

The bill in this case was filed by Mrs. Puckett, an heir of Jesse W. Darnell, deceased, attacking as void, and seeking to set aside, a sale of real estate had by decree of the county court of Henry county under a petition filed September 14, 1887, by the administrator of said Jesse W. Darnell—the petition averring that no personal property had come into his hands as administrator, and that there was no personal property belonging to said estate subject to sale for the payment of debts; that he had suggested the insolvency of said estate in due form of law, and publication had been made for creditors to file claims, and that there are now claims on file against said estate amounting, without interest, to \$485; that it would be necessary to sell the real estate, a fifty-acre tract, and the remainder interest in the dower and homestead tract, for the purpose of paying debts and expenses of administration.

The bill in the present case avers that the administrator made no inventory of the estate, made no publication for creditors, and none were made parties defendant; that no account was taken by the clerk of the court; that it was not determined that the personalty had been exhausted in course of administration; that no evidence was taken in the cause, and it was not pretended to ascertain the nature and justness of any debts, if any.

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It is averred that upon the unsupported allegations in the petition for sale of these lands, with *pro confesso* as to adults, and answer of guardian *ad litem* for complainant, Mrs. M. C. Puckett, a sale of said land was had November 5, 1887, for an inadequate price; that after the sale a list of claims were made out by the clerk, unsupported by any proof, and a *pro rata* made, but the nature and justness of the indebtedness did not appear.

This bill was filed against the present owners of the land, who claim under conveyances deraigning title under this sale, and seeks to recover complainant's interest.

The complainant filed the record in the county court proceeding as an exhibit, which shows the petition, subpoena to answer, order appointing guardian *ad litem* and his answer, sworn to October 6, 1887, order of sale, dated October 8, 1887, report of sale, made November 5, 1887, and order confirming sale November 10, 1887.

The order of sale recites that the cause was heard on the petition, exhibits, *pro confessor* order, answer of guardian *ad litem*, and record in the case of Mrs. A. M. Darnell, petition for dower and homestead, and administrator's report of no personal assets, which are considered as filed; that it appeared to the court that the personal estate of Jesse W. Darnell had been suggested, and was in fact, insolvent, there being no personal property liable to sale for the payment of debts, and that there were then due and unpaid valid outstanding debts now on file against said estate amount-

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ing to about the sum of \$500; that the only property available for the payment of debts is the remainder interest in the dower of 153 acres, and the fifty acres (which tracts are described)—ordering these lands sold for one-half cash and balance on credit of six months; that the clerk and commissioner should first offer the fifty-acre tract, and, if that should fail to bring enough to pay all debts and costs, he should then offer for sale the remainder interest in the dower and homestead.

The report of sale shows the sale first of the fifty acres at \$363.70, and, that being insufficient to pay the debts and costs, he next sold the remainder interest in the dower and homestead for \$329.

Thereupon the sales were confirmed by the court.

We deem one question as the controlling one, namely:

Did the county court have jurisdiction under the petition to sell, and was the sale a valid one under the facts herein stated?

The statutes of 1827 (chapter 54) and of 1831 (chapter 22, Shannon's Code, secs. 4000, 4001, 4002), constitute authority to sell real estate of a decedent to pay debts. These sections, as compiled by Shannon, are as follows:

Section 4000: "Where an executor not authorized by will to sell and convey real estate, or an administrator, has exhausted the personal estate of the deceased in the payment of his debts, leaving just debts or demands against him unpaid, or paid by the representative out of his own means, and the deceased died seized and possessed of real estate, the chancery or circuit

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court of the district or county where the same or a portion of it lies, may, on the petition of the representative, or any *bona fide* creditor whose debt remains unpaid, decree the sale of such lands, or of such portions thereof as may prove least injurious to the heirs and legal representatives, and as may be sufficient to satisfy the debts or demands set forth, in the bill or petition, and shown to exist.”

Section 4001: “But, before making such decree, it shall be made to appear to the satisfaction of the court that the personal estate has been exhausted in the payment of *bona fide* debts, and that the debts or demands for which the sale is sought are justly due and owing either to creditors or to the representative for advances out of his own means to pay just demands against the estate.”

Section 4002: “Suits prosecuted under the last two sections shall be conducted as other suits in equity.”

The county courts have concurrent jurisdiction with the circuit and chancery courts in such actions. Shannon’s Code, secs. 6028, 6071, 6112; *Kindell v. Titus*, 9 Heisk., 727.

In *Kindell v. Titus*, 9 Heisk., 729, it was held that the jurisdiction to sell real estate under the act of 1827 is special and limited—statutory alone—and its boundaries must be ascertained by the statute itself, and a substantial conformity to the statute must be exacted. It was held that the court cannot look to the proofs in the record of the original proceeding, seeking to attack the validity of a decree for sale of

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land collaterally, but can look to the pleadings to see whether they allege sufficient ground on which the jurisdiction of the court to make the sale can stand, and at the face of the decree to see whether upon the facts assumed to appear by the court, the court was authorized to make the decree for sale. Judge Freeman, in this opinion, remarks on the plainness of the act of 1827, and its apparently easy construction, yet that it had given birth to some apparently diverse decisions, growing mainly out of an effort on the part of our courts to meet the supposed exigencies of what are known as "hard cases;" that whenever an effort has been made to strain the construction of a plain statute or constitutional provision, the result almost inevitably is to make a set of hard precedents, which embarrass the courts in their future action.

In some of the cases on this subject it has been held that the debts should be specially set out, naming each creditor and the nature of the debt, and this should be established by proof, or the proceeding would be void. This holding arose in view of the requirement of the statute providing that only so much of the land should be sold as would "satisfy the debts or demands set forth in the bill or petition, and shown to exist." It was considered that the proceeding was a limited, statutory action, and all the requirements of the statute should exist in order to give jurisdiction and authority to make the sale.

It would seem that the statute did at least imply that each debt or demand should be set forth in the plead-

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ing and proven as charged. But the court will not confuse the question as to void proceedings and those that may be merely erroneous.

It was held at a very early day, where the administrator had paid debts for the estate and sought recovery and to have land sold because of insufficiency of personalty, that an averment of debts generally, without specifying, was sufficient, for, should the answer deny them, the complainant would be called upon to state and prove them severally to the satisfaction of the court. *Pea v. Waggoner*, 5 Hayw., 242.

This is undoubtedly a sound statement of the law of pleading. Why should a proceeding be held absolutely void because the petition did not specify each particular debt? They were subject to proof, without a several statement as to each debt. The debts should be set forth; but, if the total amount is stated, it would be highly technical to hold that, though the defendants made no objection to the pleading, a sale thirty years afterward can now be uprooted and purchasers of the property at this late date turned out.

In *Starkey v. Hammer*, 1 Baxt., 441, the former holdings to the contrary were disregarded, and an averment that there remained \$200 or \$300 of debts unpaid, was held sufficient in a collateral attack on the proceeding.

One of the earliest cases, and a leading one in the State on this question, is *Dulles v. Read*, 6 Yerg., 53, in which it was held that the act of 1827, though not a repeal of an act of 1784, was intended to remedy the

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evils which existed in the mode of proceeding against real estate under that act, one of which was a multiplicity of suits against the estate, and that the object of the act of 1827 was to bring all creditors before the court in one suit, and have the claims all adjudicated there, and protect the real estate for the benefit of all, instead of its exhaustion by the first getting a judgment.

Judge Green thought that all creditors should come or be brought in for this purpose. It was argued in that case that the act restricts the payment of debts out of the proceeds of the land to such debts as are "shown to exist in the bill," and that creditors not shown to exist in the bill were excluded. To this the court replied that this construction "sticks too close to the letter" of the statute, and that all debts, as in the course of the investigation which originated in the bill may be shown to exist, shall be included.

The modern authorities go far to sustain the decrees of courts of competent jurisdiction on collateral attacks, and rightly so. The ordinary mind puts great trust in sales of property made through the agency of the courts. Where the court has jurisdiction of the parties and the subject-matter of litigation upon pleadings putting in issue the matter adjudicated, the decree cannot be attacked collaterally, and such a decree is equally binding upon minors as adults. *Wilson v. Schaefer*, 107 Tenn., 330, 64 S. W., 208; *Hurt v. Long*, 90 Tenn., 445, 16 S. W., 968; *Robertson v. Winchester*, 85 Tenn., 171, 1 S. W., 781; *Pope v. Harrison*, 16 Lea,

82. In *Pope v. Harrison* it was held that, in a collateral attack upon the proceedings of a court of general jurisdiction, it is not necessary that the jurisdictional facts should affirmatively appear upon the face of the record; it is sufficient if the record, with its legal inferences and presumptions, shows these facts. Long lapses of time greatly strengthen the presumptions in favor of the validity of such court proceedings.

Upon collateral attack on a judgment or decree of a court of general jurisdiction by parties or privies thereto, the rule is that such judgment or decree cannot be questioned, except for want of authority over the matter adjudicated upon, and the want of authority must be found in the record itself. *Wilkins v. McCorkle*, 112 Tenn., 707, 80 S. W., 834.

In the absence of anything in the record to impeach the right of a court to determine the question involved, there is a conclusive presumption that it had such right. The evidence on which the court acted cannot be looked to.

The proceeding now under consideration is not absolutely void. The petition does not name the creditors, nor set forth the nature and amount of each individual debt; but we think that was a matter of practice, and, as suggested by Judge Green in *Dulles v. Read*, the contrary view "sticks too close to the letter of the statute."

As held by Judges Overton and Whyte in *Pea v. Waggoner*, supra, if the answer should deny a general averment of debts against the estate, the com-

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plainant would be called upon to state and prove them severally to the satisfaction of the court. Any objection to the sufficiency of the bill in this respect could be met by an amendment. Inasmuch as no objection was made by the defendants on this ground before the decree was had, it was waived.

We think, also, the view that the proceeding should be considered void because there was no report of the clerk, or fact set forth in the decree establishing the several debts and the names of the creditors, is too technical to follow. The court had before it the report of the administrator, and we must assume that there was also any other necessary proof to establish the facts set forth in the decree.

The court held the estate of Jesse W. Darnell had been suggested, and was in fact, insolvent, and that there was no personal property liable to sale for the payment of debts. The court found that there were then due and unpaid valid outstanding debts then on file against said estate amounting to about the sum of \$500. The court cannot look to the proofs, or lack of proofs, on this subject, in this collateral attack. If the record as it now appears on file fails to sustain the finding of the court, it will be presumed in this proceeding that there were before the court in some way sufficient proofs to warrant the decree. If the facts appeared to the court, it would not be material whether it should be supplemented by a report of the clerk.

It was held in an opinion by Judge Cooper that a report showing the debts and assets may generally be

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proper, and may be essential where the testimony was conflicting or the facts complicated, yet the omission would not even be reversible error where it would be a mere form. *Bloom v. Cate*, 7 Lea, 471.

The bill in the present case avers that the administrator made no inventory of the estate, and made no publication for creditors, and none were made parties defendant. These matters are not essential to the validity of the decree in this proceeding. The debts were determined by the court, and the land sold for their payment. From this there was no appeal or other proceeding for the correction of errors.

The question made that it was not determined that the personalty had been exhausted in the course of administration is met by the finding of the court that there was no personal property liable to sale for the payments of debts. This, in effect, is equivalent to the requirement of the statute. But the decrees and sale will be supported by the statutes providing for sales of realty in cases of insolvency and no personal assets. Shannon's Code, secs. 4067, 4068, 4078.

The purpose of the law to only sell so much of the real estate as is necessary to satisfy the debts or demands as set forth in the bill or petition, and shown to exist, was fully complied with; the amount of the debts being fixed and the sale had in separate tracts of only enough to pay the debts and expense of administration.

There are some opinions of our court contrary to the conclusion here reached. These cases have been fully considered.

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Considering the statutes in question, and the purposes of their enactment, and assuming all facts necessary to sustain the findings and decrees of the court, though the proceeding is statutory and limited, we fail to find any essential requirement not complied with.

The decree of the chancellor, dismissing the bill on demurrer, is affirmed.

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MRS. E. J. HUTTON *v.* H. E. WATTERS *et al.**(Jackson. April Term, 1915.)*

1. TORTS. Injury to business. Liability.

Plaintiff's petition alleged that she operated a boarding house near a school of which the defendant was president; that the defendant, having disagreed with one boarder at the plaintiff's house, demanded his ejection therefrom and was refused; that he, with others, then attempted to, and did, destroy the plaintiff's business, by threats against students who boarded with the plaintiff, by deterring new arrivals from going to the plaintiff's house, and by other means; that the plaintiff was of good character, and operated a reputable house; and that the defendants acted from ill will, and not by reason of business rivalry or competition. *Held*, that the declaration was not demurrable; the facts showing a cause of action, even though the act itself was lawful, if the defendant was actuated by malice and destroyed the plaintiff's business without reasonable advantage to himself, since every person has the right to conduct a lawful business and to have that right enforced or the wrong redressed if the right is infringed upon. (*Post*, pp. 530-544.)

Cases cited and approved: West Va. Transportation Co. v. Standard Oil Co., 50 W. Va., 611; Huskie v. Griffin, 75 N. H., 345; Dunshee v. Standard Oil Co., 152 Iowa, 623; Gott v. Berea College, 156 Ky., 376; Mogul S. S. Co. v. McGregor, L. R., 23 Q. B., Div., 598; Keeble v. Hickeringill, 11 East, 574; Carrington v. Taylor, 11 East, 571; International & G. N. Ry. Co. v. Greenwood, 2 Tex. Civ. App., 76; Graham v. St. Charles Street R. R. Co., 47 La. Ann., 214; Wesley v. Native Lumber Co., 97 Miss., 814; Globe & R. F. Ins. Co. v. Fireman's Fund Ins. Co., 97 Miss., 148; Ertz v. Produce Exchange, 79 Minn., 145; Robinson v. Texas Pine Land Association (Tex. Civ. App.), 40 S. W., 843; Lewis v. Hule-Hodges Lumber Co., 121 La., 658; Delz v. Winfree, 80 Tex., 400; Tarleton v. McGawley, Peak,

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N. P. C., 270; Clifford v. Brandon, 2 Camp., 358; Gregory v. Brunswick, 6 Man. & G., 205; Garret v. Taylor, Cro. Jac., 567; Bowen v. Hall, 6 Q. B. D., 333; Lumley v. Gye, 2 E. & B., 216. Cases cited and distinguished: Tuttle v. Buck, 107 Minn., 145; Boggs v. Duncan-Schell Furniture Co., 163 Iowa, 106; Payne v. Railroad, 81 Tenn., 507.

2. **TORTS. Injury to business.**

In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination. (*Post*, pp. 530-544.)

3. **TORTS. "Malicious" act. Justification.**

A "malicious" act is one injurious to another, intentional, and without legal justification, and is unlawful and actionable, but if an act, otherwise lawful, has a reasonable tendency to promote ends advantageous to the doer, malice in the doing does not bring it within the rule. (*Post*, pp. 530-544.)

FROM WEAKLEY.

Appeal from the Circuit Court of Weakley County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
Jos. E. JONES, Judge.

L. E. HOLLADAY, for appellants.

A. B. ADAMS and R. E. MAIDEN, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

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The averments of the declaration are, in substance, as follows:

One of the defendants, the Hall-Moody Institute, is a chartered institution of learning at Martin, Tennessee. Defendant Watters is its president, and the ten other defendants are its "directors, trustees, teachers, and advisors." The school has a large out of town patronage, and it is essential that boarding houses be conducted to accommodate these students, as well as some of the teachers. Mrs. Hutton is a widow who makes a business of keeping boarders. In June, 1910, she opened a business of the kind in Martin. During that year one James Wilson became one of her customers. Some students did the same. Defendants offered no objection until after a personal difficulty had occurred between Wilson and defendant Watters. The latter then demanded that plaintiff dismiss Wilson. She refused. Because of this refusal Watters became her enemy, and the other defendants ranged themselves with him, and all formed a conspiracy to drive her out of business. Thereupon, from time to time, during the years 1911, 1912, and 1913, as soon as plaintiff secured student boarders, or teacher boarders, the defendants, in prosecution of this purpose, caused these, plaintiff's customers, to leave her house, by threats to deprive them of the benefits of the school, or of their places, if they should refuse. By similar threats other persons were prevented from taking board with plaintiff; the defendants even going to the length of meeting trains and watching for new arrivals and deterring these from

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patronizing her house. The plaintiff is a person of good moral character, stands well in the community, and has always conducted a reputable establishment. The defendants, in setting on foot and prosecuting the conspiracy referred to, were not influenced by any motive of business rivalry, or competition, but acted as they did merely because of a feeling of ill will induced by plaintiff's refusal to turn James Wilson out of her house, and her refusal to permit Watters to dictate the price which she charged her customers.

The conspiracy was successful, and destroyed, or practically destroyed, plaintiff's business.

The damages are laid at \$5,000.

The defendants interposed a demurrer purporting numerous grounds, but all resolvable into the single objection that the declaration stated no cause of action.

The trial judge sustained the demurrer, but the court of civil appeals reversed that judgment, and the case then came to this court under the writ of *certiorari*.

We think the declaration stated a good cause of action.

Every one has the right to establish and conduct a lawful business, and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded. Such right existing, the commission of an actionable wrong is established against any one who is shown to have intentionally interfered with it, without justifiable cause or excuse.
(To establish justification, it must be made to appear,

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not only that the act complained of was otherwise lawful and performed in a lawful manner, but likewise that it had some real tendency to effect a reasonable advantage to the doer of it. But in order to determine the reasonableness of such act it must be considered from the standpoint of both parties, with a view to ascertaining whether the defendant has acted merely in the due exercise of his own right to carry on business for himself. If this be found in his favor, while he may have done the plaintiff harm, he cannot be adjudged to have done an injury in the legal sense; that is, a wrongful act in violation of the legal right of another. Whether the defendant was in the reasonable exercise of his own similar rights must, from the viewpoint stated, be determined by the court, or court and jury in each case as it arises, on the law and the evidence. A defendant cannot excuse himself by the mere fact that the means used were his own, his property, his servants. He cannot, with justification in law, use his property, or anything else that appertains to him, in such manner as to wantonly injure another. Still, it has been decided, by the weight of authority, that if the act complained of, being otherwise lawful in itself, had a reasonable tendency to promote ends advantageous to the defendant in the conduct of his own business, it cannot be correctly adjudged an illegal agency or operation by the fact that the doer of it was moved also by a feeling of ill will, or personal malice, towards the person against whom his act was directed (*West Va. Transportation Co. v. Standard Oil Co.*, 50 W. Va., 611,

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40 S. E., 591, 56 L. R. A., 804, 88 Am. St. Rep., 895; 62 L. R. A., 673, note; L. R. A., 1915B, 1180, note); but if the act is otherwise wrongful, such personal malice may aggravate the damages. (Cooley on Torts [2d Ed.], pp. 832, 836).

In short, if an act be hurtful to another, intentional, and without legal justification, it is malicious in the true legal sense (19 Am. & Eng. Ency. of Law [2d Ed.], 623, note 4), therefore unlawful, and is actionable.

Of course it is wholly impossible to formulate a description which will cover all acts which are intentionally hurtful to another, and at the same time justifiable in law. As already said, each case, as it arises, must be determined on its own facts, and in the light of the principles stated. It is left in each case for the court, or the court and jury, according to the way in which the controversy is presented, to say whether the defendant's conduct complained of was, in view of all the circumstances, a reasonable and proper exercise of his right of self-protection, or self-advancement, both as to the substance of it, and the method of it. *Huskie v. Griffin*, 75 N. H., 345, 74 Atl., 595, 27 L. R. A. (N. S.), 966, 139 Am. St. Rep., 718; *Dunshee v. Standard Oil Co.*, 152 Iowa, 623, 132 N. W., 371, 36 L. R. A. (N. S.), 263; *Gott v. Berea College*, 156 Ky., 376, 161 S. W., 204, 51 L. R. A. (N. S.), 17; *Mogul S. S. Co. v. McGregor*, L. R., 23 Q. B. Div., 598; Mod. Am. Law, vol. 2, pp. 327-336.

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In the latter authority it is said, quoting 28 Law Quarterly Review, 67:

“The theory of justification consists in a proper adjustment and compromise between the two competing rights that are equally protected in law. It has been already observed that the enjoyment by a particular individual of the right of freedom, as to how he should bestow his capital and labor, is not absolute, but qualified by the existence of equal rights in the other members, to such an extent as to be made compatible with an equally free enjoyment of these rights by the rest of the community. In fact, every case of justification reduces itself to the question how far the rights of an individual can be so circumscribed in accordance with a general law of freedom as to leave an equal scope for the free enjoyment of the competing rights of his fellow men.”

“But,” said Lord Justice Bowen, in *Mogul S. S. Co. v. McGregor*, supra, “such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one’s own lawful gain, or the lawful enjoyment of one’s own right.” The good sense of the tribunal which had to decide would have to analyze the circumstances and discover on which side of the line each case fell. But if the real object was to enjoy what was one’s own, or to acquire for one’s self some advantage in one’s property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that

it was done without just cause or excuse.” Id. 618, 619.

Although, as indicated, the defense of justification arising in such controversies is a question for decision in each case, as concentered in its own peculiar facts, yet the precedents shed much light in the way of illustrating the principles involved.

In an early English case, decided during the reign of Queen Anne (*Keeble v. Hickeringill*, 11 East, 574), reported in full as a note to *Carrington v. Taylor*, 11 East, 571, 574, 577, it appeared that the plaintiff had prepared a decoy pond for the purpose of taking wild fowl. The defendant knowing this, and purposing to injure the plaintiff by frightening away the wild fowl accustomed to resort to the pond, discharged guns on his own land, and the wild fowl were thus driven away. It was held that an action on the case would lie for the damages thus occasioned. Holt, Chief Justice, said that if the defendant had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the latter, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff; but, when, without benefit to himself, real or intended, he successfully committed the act intending to accomplish the injury to the plaintiff, it was actionable.

In *International & G. N. Ry. Co. v. Greenwood*, 2 Tex. Civ. App., 76, 21 S. W., 559, it was held that a railway company was liable to the proprietor of a boarding house for having deprived him of the patron-

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age of its employees by threatening to discharge them if they patronized him. It did not appear that any interest of the railway company was served, or any benefit to it effected, by such order.

In *Graham v. St. Charles Street R. R. Co.*, 47 La. Ann., 214, 16 South., 806, 27 L. R. A., 416, 49 Am. St. Rep., 366, it appeared that the foreman of the railway company, without any purpose of advancing its interests, threatened to discharge its servants if they continued to trade with plaintiff, who was conducting a grocery store near the stables and buildings of the company, in New Orleans, and by this order caused injury to the plaintiff. This conduct was held unjustifiable and therefore actionable.

In *Wesley v. Native Lumber Co.*, 97 Miss., 814, 53 South., 346, Ann. Cas., 1912D, 796, it was held that an action for damages would lie against a corporation where it had maliciously injured a retail dealer by threatening to discharge any of its employees who should deal with him. To the same effect is *Globe & R. F. Ins. Co. v. Fireman's Fund Ins. Co.*, 97 Miss., 148, 52 South., 454, 29 L. R. A. (N. S.), 869.

In *Ertz v. Produce Exchange*, 79 Minn., 145, 81 N. W., 737, 48 L. R. A., 90, 79 Am. St. Rep., 433, it was held that a conspiracy by several to refuse to deal with a dealer in farm produce, having a profitable business, and to induce others to do likewise, it not appearing that such interference of the persons so conspiring was to serve any legitimate interests of their own, but that it was done merely to injure him, and that the conspir-

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acy had been carried into execution, whereby the plaintiff's business was ruined, furnished a cause of action in favor of the injured party.

On the other hand, it was held in *Robison v. Texas Pine Land Association* (Tex. Civ. App.), 40 S. W., 843, that an employer who issued store checks redeemable in merchandise was not liable to an action by another storekeeper for threatening to discharge its employees if they traded with him, and for refusing to take up any checks which had passed through the hands of plaintiff. The ground of the decision was that the plaintiff had no superior right to trade with defendant's employees; that defendant had the right to appropriate to itself all of the customers it could command, provided it did not violate a definite legal right of the plaintiff. The point of view is brought out more clearly in *Lewis v. Huie-Hodges Lumber Co.*, 121 La., 658, 46 South., 685. The defendant was the employer of a large number of people, and in connection with its business carried on a general mercantile store for the purpose of selling goods to its employees and others. It notified its employees that if they bought goods of the plaintiff they would be discharged. The court held that defendant's act was justifiable as a means of safe-guarding its own interests.

An interesting case is *Delz v. Winfree*. The controversy was first presented on a petition stating, in substance, that the defendants, members of two different firms engaged in buying and slaughtering live animals fit to be slaughtered and sold as fresh butcher's meat,

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conspired with each other, and with a butcher, not to sell to the petitioner for cash live animals or slaughtered meat for the prosecution of his business, and that in pursuance of this conspiracy they refused to sell him, although offered their own price in money, by reason of which unlawful combination and malicious interference the petitioner was compelled to close his business, and so had been damaged. This was held to state a cause of action. 80 Tex., 400, 16 S. W., 111. But when the case came on for trial on the issues made, it appeared that the refusal was based on the fact that the petitioner was indebted to the defendants, and they had refused to sell him because, he being insolvent, they deemed it prudent to have no further dealings with him until he had paid them what was due them. There were verdict and judgment in favor of the defendants, and on appeal the judgment of the trial court was sustained, the court holding that the reason assigned and proven justified the act complained of. 6 Tex. Civ. App., 11, 25 S. W., 50.

But in *Dunshee v. Standard Oil Co.*, 152 Iowa, 628, 618, 132 N. W., 371, 36 L. R. A. (N. S.), 263, it was held that the principle of reasonable self-protection, or self-advancement, did not justify the action taken. There it appeared that the defendant, a wholesaler, when its customer in a particular city began to purchase a portion of his stock from a rival concern, entered into a retail business solely for the purpose of driving him out of business, and when this had been accomplished

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ceased its said retail business. It was held that these facts made out a case for damages.

So, the case of *Tuttle v. Buck*, 107 Minn., 145, 119 N. W., 946, 22 L. R. A. (N. S.), 599, 131 Am. St. Rep., 446, 16 Ann. Cas., 807. Here it appeared that the plaintiff, a barber, had for several years carried on a profitable business, and that the defendant, a wealthy banker, possessed of great influence, set up an opposition shop, solely for the purpose of injuring the plaintiff, and without profit to himself, employing and paying barbers to conduct such opposition business, whereby plaintiff's business was ruined. It was held that these facts made a case for relief. The court said:

“To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton and an actionable tort.”

To the same effect is *Boggs v. Duncan-Schell Furniture Co.*, 163 Iowa, 106, 143 N. W., 482, L. R. A., 1915B, 1196, quoting and approving *Tuttle v. Buck*.

The illegal acts excluded by general reference in the excerpt we have made from *Mogul S. S. Co. v. McGregor*, supra, are thus particularized by the Lord Justice in an earlier part of his opinion:

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“No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. McGawley*, Peak, N. P. C., 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp., 358; *Gregory v. Brunswick*, 6 Man. & G., 205); the disturbance of wild fowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 574, n.); the impeding or threatening servants or workmen (*Garret v. Taylor*, Cro. Jac., 567); the inducing persons under personal contracts to break their contracts (*Bowen v. Hall*, 6 Q. B. D., 333; *Lumley v. Gye*, 2 E. & B., 216)—all are instances of such forbidden acts.”

Applying the principles stated to the case before us, we are of the opinion that the defendants acted without legal excuse. They were not justified by plaintiff's refusal to dismiss her boarder, James Wilson, nor by her refusal to arrange her rates according to the directions of the defendant Watters. If the prices charged were pleasing to her patrons, no other person had any right to complain. No such defense appears as that set out in *Gott v. Berea College*, supra, based on the welfare of the students, or the right of the college to make rules for their control.

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We are referred to the case of *Payne v. Railroad*, 13 Lea (81 Tenn.), 507, 49 Am. Rep., 666, as an authority in opposition to the views herein stated. While that case was ably reasoned by the learned special judge who wrote the majority opinion, and is not without support in the authorities, we are constrained to hold that it was erroneously decided. We are better satisfied with the dissenting opinion. It is certain that the prevailing opinion in that case is out of harmony with the great weight of authority as now understood. Moreover, we have long been dissatisfied with that opinion, believing that it was fundamentally wrong.

The real question was not, as assumed in that opinion, whether a master had the right to discharge his servants without liability to account to a third party for his reasons, good or bad, but it was whether the defendant had the right to injure the business of the plaintiff without any purpose to effect an advantage or benefit to itself. The plaintiff in that case could not lawfully question defendant's authority over its servants, but he could question the defendant's exercise of that authority solely for the purpose of destroying his business, the infliction of an injury on his business without legal justification, and hence an act malicious in law.

It was said in that opinion that the act was not malicious in law, because although it inflicted a wrong on the plaintiff such wrong was not a legal wrong, but only a moral wrong, therefore, not an unlawful act. That position assumed the whole matter in contro-

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versy. We think the learned special judge confounded the right of a master to discharge his servants subject to legal accountability to no one save the servants themselves for breach of contract, with the supposed right to interfere with the lawful business of another by threats made against those servants. It is said, if the master had the right to discharge his servants, he necessarily had the right to threaten to discharge them. The conclusion does not logically follow. He had no right to condition his threat, or the execution of his threat, on an injury to be inflicted, under his orders, by the servants on the personal business of another. The defendant could not lawfully threaten to discharge his servants if they should fail to assault and beat the plaintiff. Why? Because to assault and beat one who is doing no harm is unlawful. So, it is unlawful to interfere with another's business without a good excuse. The means cannot justify the act, or turn a wrong into a right. The opinion referred to is based on the hypothesis that the means used can effect this metamorphosis, if that means be the exercise of the power which the master has over his servants through their fear of losing their places, and hence their means of livelihood, and no violence be done. It cannot be that a master has power, within the law, to direct his servants where to buy for themselves, or where not to buy, when no rightful good to himself can be effected through such direction. That would be to sanction tyranny, the enslavement of servants, and the subversion of the law itself. The law wills freedom, save

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where a man is bound by its own behests, or has, through contract, submitted his duty to the will of another. Where one employs the power which the law gives him by contract for purposes other than those of the contract, to the end that he may enslave the will of the person who has contracted with him, he does wrong, and if injury to another occurs thereby, he does a legal wrong, and cannot shelter himself behind the contract which he has diverted from its purposes, and so prostituted.

It is said in the opinion we are criticizing that a man has the legal right to buy where he chooses and to sell to whom he will. This is true; but we think the point had no fitting part in the solution of the question then before the court. 'The right of a man to dispose of his own custom does not include the power, in law, to influence or control the custom of other people to the injury or destruction of the business of third parties. Such influence one can lawfully exercise only when it is used for the building up of his own business ~~or~~ the advancement of his own lawful interests.' The true theory of the matter was fully discerned by Mr. Justice Freeman, and expressed by him in his masterly dissenting opinion filed in the cause in these words:

"The rule I have maintained is in strict accord with a maxim of the law, so well founded in reason as to need no argument or authority to support it; that is, that a man must so use his own as not to do an injury to others. That this means he shall so enjoy his legal right, as not to do wrong to the legal rights of

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another, I freely concede. But here is a use of his legal right to discharge employees, for the direct purpose and with no other, and for no other reason except to prevent their trading with a party legitimately entitled by his location and the character of his business to such trade. Here is the use of a legal right, to deprive the other of that which is his legal right, to wit, the property he has in the good will of his business, which consists in his business character for integrity and fair dealing, his convenience of location to his customers, the character of goods he sells, and fairness of price for which they are sold, and the like. All these make up as elements of that property now well recognized in our law as the good will of a business. For a party who has the power, to use that power, to destroy or injure the value of this property, in the exercise of the right, not for any reason of advantage to himself, but solely to injure another, ought not to be permitted by an enlightened system of jurisprudence in this country.

“It is argued that a man ought to have the right to say where his employees shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reason for what he has done; that the trader was unworthy of patronage; that he debauched the employee, or sold, for instance, unsound food, or any other cause,

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that affected his employee's usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employee for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold a threat over the employee *in terrorem* to fetter the freedom of the employee, and for the purpose of injuring an obnoxious party.

“Such conduct is not justifiable in morals, and ought not to be in law, and when the injury is done as averred in this case, the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer, an improper and injurious use is all it forbids.” 13 Lea (81 Tenn.), 541, 542, 49 Am. Rep., 666.

All of the foregoing excerpt is in accord with the views now held by the court (including as matter of justification acts for the lawful advancement of the master's own interest), and in harmony with the best judicial thought of the present time, and in our judgment should have controlled the decision of the cause.

We overrule *Payne v. Railroad Co.*, in so far as it is in conflict with the present opinion.

The judgment of the court of civil appeals in the case before us, reversing that of the trial court, must, on the grounds herein stated, be affirmed, and the cause remanded for issue and trial.

Crigger v. Coca-Cola Bottling Co.

H. C. CRIGGER v. COCA-COLA BOTTLING COMPANY.

*(Jackson. April Term, 1915.)***1. FOOD. Injurious substances.**

The duty of one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous of exercising care to see that nothing unwholesome or injurious is contained in the bottle or package is not in the nature of an implied warranty, and is based upon negligence. (*Post*, pp. 548-552.)

Cases cited and approved: *Boyd v. Coca-Cola Bottling Works*, 132 Tenn., 23; *Jackson Coca-Cola Bottling Co. v. Chapman* (Miss.), 64 So., 791; *Thomas v. Winchester*, 6 N. Y. (2 Selden), 397; *Salmon v. Libby*, 219 Ill., 421; *Tomlinson v. Armour*, 75 N. J. L., 748; *McQuaid v. Ross* (Wis.), 22 L. R. A., 195; *Bishop v. Weber*, 139 Mass., 411; *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed., 865; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass., 64; *Van Bracklin v. Fonda*, 12 Johns. (N. Y.), 468; *Craft v. Parker* (Mich.), 21 L. R. A., 139; *Brown v. Marshall*, 47 Mich., 576; *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.), 219; *Blood Balm Co. v. Cooper*, 83 Ga., 457; *Welser v. Holzman*, 33 Wash., 87; *Peters v. Jackson*, 50 W. Va., 644; *Farrell v. Manhattan Market Co.*, 198 Mass., 271; *Crocker v. Baltimore Dairy Lunch Co.*, 214 Mass., 177.

Case cited and distinguished: *Watson v. Augusta Brewing Co.*, 124 Ga., 121.

2. FOOD. Sales. Injurious substances.

One who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, or articles inherently dangerous is liable for breach of a duty to the public in the preparation thereof, regardless of the privity of contract to any one injured for a failure to properly safeguard and perform such duty. (*Post*, p. 552.)

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3. FOOD. Deleterious beverage. Evidence.

In an action for damages for an illness caused by swallowing a decomposed mouse in a bottle of Coca-Cola purchased from a local dealer to whom it had been sold by a bottling company, evidence *held* to sustain a finding that the bottling company was not at fault. (*Post*, pp. 552, 553.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—Hon. A. B. PITTMAN, Judge.

KING & LANIER, for plaintiff.

BELL, TERRY & BELL and CARUTHERS EWING, for defendant.

MR. JUSTICE FANCHER delivered the opinion of the Court.

The plaintiff drank a bottle of Coca-Cola, a beverage sold generally on the market as wholesome and harmless. In doing so he took into his mouth, and partially swallowed, a decomposed mouse, which caused him to become very sick, and he sues for damages. The defendant does not make the beverage, but buys it in barrels from the manufacturer and bottles it.

The bottle in question was sold by defendant to a local dealer and by him sold to plaintiff.

The question presented is, whether a bottling company engaged in bottling Coca-Cola, a beverage made

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by another, warrants to the ultimate consumer that its bottle contains no injurious, harmful, or deleterious substance, or is the bottling company liable only for negligence, or the omission to use proper care in the work?

The proof shows that the method used at the bottling plant is fully equal to the best. The empty bottle is passed through vats of strong caustic soda solution and then rinsed under pressure with water as hot as the bottle will stand, then inspected by the use of a strong electric light, then brushed out with a rapidly revolving brush and again rinsed; the bottle is again inspected over a brilliant electric light, and then filled with Coca-Cola, using a fine strainer, when it is capped, and finally inspected.

The trial judge charged the jury on the theory that if the defendant was free from negligence in the bottling of the beverage there was no liability. The jury found in favor of the defendant, and judgment was accordingly entered. The court of civil appeals affirmed on the ground that the declaration averred negligence and the jury had found against plaintiff on that question.

The case is briefed here in support of the petition for *certiorari*, and by the defendant, as to whether there is an implied warranty on the part of the Coca-Cola Bottling Company, which results in favor of the ultimate consumer, regardless of any question of negligence. The declaration, liberally treated, will admit

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the question, and the case must be determined upon that standard.

In the case recently determined by this court of *Boyd v. Coca-Cola Bottling Works*, 177 S. W., 80, opinion by Mr. Justice Green, the defendant was held liable to the ultimate consumer for injuries from drinking a bottle of Coca-Cola in which was contained a cigar stub. The bottle in that case was bought from an intermediate dealer, to whom the defendant manufacturer had sold it, and it was held that want of contract or privity between defendant and the person injured constituted no defense. It was determined in that case that beverages fall within the class of articles such as foods and medicines, where a liability may exist upon the ground that one placing upon the market such products in sealed bottles assumes a duty to the general public of exercising care to see that nothing unwholesome or injurious is contained in the bottle. For a negligent breach of this duty the defendant was liable.

In the present case, we are to inquire a step further. Does this duty exist regardless of negligence, and is it in the nature of an implied warranty? Some of the cases seem to so hold. The case of *Jackson Coca-Cola Bottling Co. v. Chapman* (Miss.), 64 South., 791, 7 Neg. & Com. Cas. Ann., 112, note, seems to go this extent, citing *Watson v. Augusta Brewing Co.*, 124 Ga., 121, 52 S. E., 152, 1 L. R. A. (N. S.), 1180, 110 Am. St. Rep., 157.

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In the *Augusta Brewing Company Case*, the supreme court of Georgia stated the rule to be:

“When a manufacturer makes, bottles, and sells . . . a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious.”

It does not appear that the direct question was at issue in that case as to a warranty, regardless of negligence. Most of the cases on the question show some negligence or omission of duty or care, and are based upon that idea.

There are many authorities holding an implied warranty to exist, as between seller and buyer of articles to be used for a specific purpose, that such articles are proper and suitable for the use to which they are to be applied. But we see no reason or principle upon which a warranty might run with an article for consumption like a warranty of title running with land. We think the real ground of liability of the seller to an ultimate consumer is, more properly speaking, a duty one owes to the public not to put out articles to be sold upon the markets for use injurious in their nature, of which the general public have not means of inspection to protect themselves. This duty has been applied to manufacturers of drugs, foods, beverages, poisons, and other things inherently dangerous.

One of the leading cases on the subject is *Thomas v. Winchester*, 6 N. Y. (2 Selden), 397, 57 Am. Dec., 455.

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That case is referred to in many more recent opinions. A manufacturing druggist was held liable for negligently putting up, labeling, and selling as and for the extract of dandelion, a simple and harmless medicine, a jar of the extract of belladonna, which is a deadly poison, whereby the plaintiff was injured, on the ground of a breach of a public duty, and that this was the result whether the injured person is an immediate customer of defendant or not. Negligence was the basis of liability in that case, as it was in most cases of this nature. See notes 57 Am. Dec. (Extra Ann.) 568; *Salmon v. Libby*, 219 Ill., 421, 76 N. E., 573; *Tomlinson v. Armour*, 75 N. J. L., 748, 70 Atl., 314, 19 L. R. A. (N. S.), 923 (negligence in preparation of canned meat); note to *McQuaid v. Ross* (Wis.), 22 L. R. A., 195; *Bishop v. Weber*, 139 Mass., 411, 1 N. E., 154, 52 Am. Rep., 715 (negligence in furnishing unwholesome meat); *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed., 865, 57 C. C. A., 237, 61 L. R. A., 303; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass., 64 (negligence by manufacturer in selling dangerous article he knew to be an explosive); *Van Bracklin v. Fonda*, 12 Johns (N. Y.), 468, 7 Am. Dec., 339 (negligence in sale of unwholesome provisions, but holding that vendor is bound to know that they are sound and wholesome); *Craft v. Parker* (Mich.), 21 L. R. A., 139; note; *Brown v. Marshall*, 47 Mich., 576, 11 N. W., 392, 41 Am. Rep., 728 (opinion by Cooley, J., holding that a high degree of care is required of a druggist, but that actual negligence cannot be dispensed with as a necessary element

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in liability when mistake has occurred); *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.), 219, 56 Am. Dec., 563 (holding *caveat venditor* should apply to a druggist in seeing that his drugs are what they are pretended to be, and that he cannot escape liability on a pretext that it was an accidental or innocent mistake); *Blood Balm Co. v. Cooper*, 83 Ga., 457, 10 S. E., 118, 5 L. R. A., 612, 20 Am. St. Rep., 324 (liability to ultimate consumer for wrong of proprietor of medicine in the prescription and direction as to dose); *Weiser v. Holzman*, 33 Wash., 87, 73 Pac., 797, 99 Am. St. Rep., 932 (liability without regard to privity of contract for knowingly selling and delivering to another, who is injured thereby, an article intrinsically dangerous, without notice to purchaser of intrinsic danger); *Peters v. Jackson*, 50 W. Va., 644, 41 S. E., 190, 57 L. R. A., 428, 88 Am. St. Rep., 909 (druggist liable from incompetency or negligence in selling to one person wrong poisonous medicine, whereby third person is injured); *Farrell v. Manhattan Market Co.*, 198 Mass., 271, 84 N. E., 481, 15 L. R. A. (N. S.), 884, 126 Am. St. Rep., 436, 15 Ann. Cas., 1076 (reviewing established English cases that hold there is no implied condition or warranty that a food is fit to be eaten, unless sold by a dealer and the food is selected by him, and concluding that this is the true rule); *Crocker v. Baltimore Dairy Lunch Co.*, 214 Mass., 177, 100 N. E., 1078, Ann. Cas., 1914B, 884 (that finding for plaintiff for injuries from what might be ptomaine poisoning is not warranted without any

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evidence that the defendant was negligent in purchasing its food supplies).

From a careful consideration of the subject, and after mature thought, we are of opinion as follows:

1. That one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to any one injured for a failure to properly safe-guard and perform that duty.

2. This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure foods, beverages, and medicines, we believe with Judge Cooley, as expressed in *Brown v. Marshall*, supra, that negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury without some negligent act or omission.

In the present case, the mouse may have gotten into the bottle by some unavoidable accident, but proper inspection should have disclosed the fact, and if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the Bottling Company plant, we would consider it our duty to reverse the case, because of the high duty resting on the defendant.

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But the jury was told to inquire whether the mouse was in the bottle when it left the hands of this company, and, if so, whether its presence there was due to the negligence of the company. The court suggested to the jury the theory of the defendant that there was opportunity for malevolent persons to open this bottle and put the mouse into it before or after it left the factory, and they should use their common sense as men in deciding the issue. In view of the extraordinary care shown to exist at the bottling plant and the verdict of the jury, it may be that this thing occurred without the fault of the defendant. There are sufficient inferences that may be drawn from the facts to sustain the finding.

Affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

J. H. HOGAN *v.* HAMILTON COUNTY *et al.*

(Knoxville. September Term, 1915.)

1. OFFICERS. Eligibility. Constitutional and statutory provisions. Defaulter.

Under the express provisions of Const., art. 2, sec. 25, and Shannon's Code, sec. 1069, the election of a defaulter in the payment of State revenue to the office of clerk of the county board of road commissioners was absolutely void. (*Post*, pp. 556, 557.)

Cases cited and approved: *Newman v. Justices of Jefferson County*, 25 Tenn., 41; *Pearce v. Hawkins*, 32 Tenn., 88; *Mayor and Aldermen of Memphis v. Woodward*, 59 Tenn., 499.

Code cited and construed: Sec. 1069 (S.).

Constitution cited and construed: Art. 2, sec. 25.

2. OFFICERS. De facto officer. Rights.

The fact that one whose election as clerk of a county board of road commissioners was absolutely void was permitted by the

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county court to take the oath and to give bond added nothing to his rights, and he merely became a *de facto* officer and could assert no rights. (*Post*, pp. 556, 557.)

3. **OFFICERS. "De jure officer." Right to compensation.**

The clerk of a county board of road commissioners entitled to hold over under the constitution, after the void election of his intended successor, was the "*de jure* officer" entitled to serve and to receive the salary of the office. (*Post*, pp. 556, 557.)

4. **ELECTIONS. Contest. Jurisdiction. Chancery.**

The Chancery Court has no jurisdiction of a bill brought to contest the election of the one receiving the highest number of votes, on the ground of his ineligibility, or to declare the election void. (*Post*, pp. 557, 558.)

Case cited and approved: *Adcock v. Houk*, 122 Tenn., 269.

5. **OFFICERS. Action for salary. Evidence. Right to office.**

In a suit against a county for salary due the clerk of the board of road commissioners, plaintiff might show that the person who had been nominally elected as his successor, and who had given bond and taken the oath of office was a defaulter, and hence not a *de jure* officer, but only a *de facto* officer. (*Post*, p. 558.)

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—W. B. GARVIN, Chancellor.

S. H. FORD, LEWIS SHEPHERD and ALLISON, LYNCH & PHILLIPS, for appellants.

J. H. EARLY and W. B. SWANEY, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

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Complainant was clerk and member of the board of public road commissioners of Hamilton county, with a term beginning the first Monday in September, 1912, and running to the first Monday of September, 1914, and until his successor should be elected and qualified. At the August election, 1914, one Joe N. McCutcheon received the highest number of votes, obtained a certificate of election, presented himself to the county court, and was permitted to take the oath and execute bond for the office. He thereupon demanded the possession of the books, papers, etc., from Hogan. The latter refused to surrender the office, or the books and papers. McCutcheon, after coming to the office a few days, desisted; an injunction having been sued out against him by Hogan. Hogan's refusal to surrender the office was based on the fact that McCutcheon had been clerk of the county court and had defaulted in the payment of State revenue, and still remained a defaulter on the day he was elected clerk. Hogan held the office until it was abolished by the legislature of 1915. During this time a salary of \$1,050 accrued, but the county refused to pay it. When two months had elapsed Hogan sued for the amount then due, but subsequently filed an amended bill in which he claimed for the whole time. The question is whether the county can be compelled to pay this salary. In our judgment this question should be decided in the affirmative.

It is fully proven, and not denied, that McCutcheon was a defaulter as previously stated. In view of this fact, his election was absolutely void under the Con-

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stitution, article 2, section 25, and under Shannon's Code, section 1069. The fact that he was, by the county court, permitted to take the oath and give bond, added nothing to his position. He simply became a *de facto* officer, and could assert no rights. *Newman v. Justices of Jefferson County*, 6 Humph., 41; *Pearce v. Hawkins*, 2 Swan., 88, 57 Am. Dec., 54. Hogan, being the *de jure* officer by virtue of his right to hold over under the constitution, was entitled to serve in the office and to take all of its emoluments. Even if McCutcheon had undertaken to perform the duties of the office, and had collected the salary, this would not have relieved the county from the duty to pay Hogan, the rightful officer. *Mayor and Aldermen of Memphis v. Woodward*, 12 Heisk. (59 Tenn.), 499, 27 Am. Rep., 750. There was therefore no error in the chancellor's action in rendering a decree in favor of Hogan and against the county.

There was another case argued at the present term, brought by Hogan against McCutcheon, wherein complainant sought to enjoin McCutcheon from taking the office. It was properly held in an opinion filed by Mr. Special Justice Franz that the chancery court had no jurisdiction, since the bill referred to was but an effort to contest the election of McCutcheon; the ineligibility of a person having the highest number of votes being one ground of contest in order that the election may be declared void, as shown by well known cases in this State. The chancery court has no power to entertain

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jurisdiction of a contested election controversy. *Adcock v. Houk*, 122 Tenn., 269, 122 S. W., 979.

The case now before us for decision is not in any sense an election contest, but a direct suit against the county for salary due. In such a case the fact may be proven that the person who was nominally elected, and who gave bond and took the oath of office, was a defaulter, and hence not a *de jure* officer, but only an officer *de facto*. Such proof being made, the consequences already mentioned naturally follow.

It results that the decree of the chancellor must be affirmed, with costs.

Lowenthal v. Underdown.

L. LOWENTHAL, JR. v. G. K. UNDERDOWN.

(*Knoxville*. September Term, 1915.)

1. LICENSES. Merchants. Persons liable. "Solicitor."

One who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money and delivering no goods, is a mere "solicitor," and not liable for a merchant's license fee. (*Post*, pp. 559-561.)

2. CONSTITUTIONAL LAW. Judicial functions. Political questions.

Whether nonresident merchants should be allowed to compete for local trade by employing solicitors without paying a merchant's license fee is a political question for the legislature, with which the courts have no concern. (*Post*, pp. 559-561.)

FROM McMINN.

Appeal from the Circuit Court of McMinn County.—
SAM. C. BROWN, Judge.

FINLAY, CAMPBELL & COFFEY, for appellants.

FRANK M. THOMPSON, Attorney-General, for appellee.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

H. Schwartz & Sons are retail shoe merchants in the city of Chattanooga. They sent plaintiff in error to

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Athens, in McMinn county, with samples of shoes. Plaintiff in error exhibited these shoes to persons who were not merchants, but merely private individuals or consumers, and took orders addressed to H. Schwartz & Sons. Plaintiff in error sold no shoes, did not undertake to sell any, collected no money, and delivered no shoes. H. Schwartz & Sons accepted these orders, if found satisfactory, and shipped the shoes to the purchasers by express. Plaintiff in error had no other part in the transaction than merely soliciting the orders. Under the course of business H. Schwartz & Sons were at liberty to refuse any orders that did not meet their approval. The defendant in error demanded of plaintiff in error \$5.25 as merchant's license. He paid the sum under protest, and sued to recover it back. The trial judge dismissed his suit, and an appeal was then prosecuted to this court.

We think the learned trial judge was in error. Lowenthal was not a merchant, under the facts stated, but a mere solicitor. It is said in an opinion filed in the case by the learned trial judge, as a part of his judgment, that it is unjust to the merchants of Athens that Chattanooga merchants should be permitted to sell within their territory without obtaining a merchant's license, and thus paying taxes similar to those of such merchants of Athens. This is a political question for the consideration of the legislature. Our duty is only to determine whether, under the laws as they now exist, the plaintiff in error is liable to the tax as a merchant. We think it very clear that, under the facts

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stated, he was not a merchant. No effort was made to reach H. Schwartz & Sons, or tax them as merchants doing business in Athens; therefore no question arises on that subject in the present case.

On the grounds stated the judgment of the trial court must be reversed, and judgment entered here in favor of the plaintiff for the amount paid, and costs.

Imboden v. City of Bristol.

ROBERT IMBODEN *et al.* v. CITY OF BRISTOL *et al.*

(*Knoxville*. September Term, 1915.)

1. MUNICIPAL CORPORATIONS. Issue of bonds.

Where the credit of a city is to be used for a proper city purpose, bonds may be issued, if due authority is given by the legislature, without a submission of the matter to a vote of the people. (*Post*, pp. 564-567.)

Acts cited and construed: Acts 1913, ch. 18.

Cases cited and approved: *Arnold v. Knoxville*, 115 Tenn., 195; *State ex rel. v. Powers*, 124 Tenn., 556; *Shelby County v. Exposition Co.*, 96 Tenn., 653; *Colburn v. Railroad*, 94 Tenn., 43.

Constitution cited and construed: Art. 2, sec. 29.

2. MUNICIPAL CORPORATIONS. Street improvements. Bonds.

Const., art. 2, sec. 29, declares that the credit of no county, city, or town shall be given in aid of any person, association, or corporation except upon an election first held by the qualified voters. Priv. Acts 1913 (1st Ex. Sess.), ch. 18, authorized the city of Bristol to improve streets and issue bonds to pay for the improvement; the bonds to be the absolute and general obligations of the municipality. The act further provided for the payment of two-thirds of the cost by abutting property owners, and they were allowed five years to complete payments. *Held* that, though the abutting property owners received a peculiar benefit and were specially assessed for it, yet, the improvement of the streets being for the benefit of the city and its inhabitants, the issuance of bonds for payment of the entire work was not a pledge of the city's credit for the benefit of such abutting owners. (*Post*, pp. 564-567.)

FROM SULLIVAN.

Imboden v. City of Bristol.

Appeal from the Chancery Court of Sullivan County.
—HAL H. HAYNES, Chancellor.

HARR & BURROW, for appellants.

C. J. ST. JOHN, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by residents and taxpayers of the city of Bristol to enjoin the issuance of certain bonds about to be negotiated by the city in connection with street improvement work. The bonds were authorized by chapter 18, Acts of the First Extra Session of the legislature of 1913—a front foot assessment act. The bill challenges the constitutionality of this act. A demurrer was interposed by the city and sustained by the chancellor, and from this decree complainants have appealed.

The act in question is not materially different from other statutes of this State providing for special assessments for local improvements, and, among other things, it provides that two-thirds of the cost of the work shall be borne by the abutting owners and one-third by the city. It authorizes the city to issue bonds to pay for the part of the work charged to the abutting owners, and provides that the city shall be repaid by assessments levied on the adjacent property to be discharged by the property owners, at their option, in five annual payments.

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It is said that the last-mentioned provision of the act violates section 29, art. 2, of the Constitution, as follows:

“But the credit of no county, city or town shall be given or loaned to or in aid of any person, . . . association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election.”

The argument against the validity of the statute is founded on one of the reasons given in our cases justifying special assessments. It is said in these cases that the justification for special assessments for local improvements is that property contiguous to such improvements receives a peculiar benefit not shared by property elsewhere located. So the cost of the improvement may be assessed in proportion to benefits conferred, and is not required to be imposed on the whole body of property or taxpayers equally. *Arnold v. Knoxville*, 115 Tenn., 195, 90 S. W., 469, 3 L. R. A. (N. S.), 837, 5 Ann. Cas., 881; *State ex rel. v. Powers*, 124 Tenn., 556, 137 S. W., 1110.

Taking this statement of the law as a basis, it is argued that such improvements are for the benefit of adjacent property owners, that bonds issued to pay for such improvements are in aid of such property owners, and therefore the issuance of such bonds is a giving or lending the city's credit in aid of such parties in violation of the section of the constitution quoted.

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It should be observed that chapter 18 of the Acts of the First Extra Session of 1913 provides that the bonds here in controversy shall be "the absolute and general obligations of the municipality."

It is conceded that improvement of its streets within its borders is a proper corporation purpose, and with legislative authority any municipality may issue its bonds for such a purpose. Where the credit of a city or a county is to be used for a proper county or corporation purpose, if due authority is given by the legislature, bonds may be issued by the city or county for such purposes without a submission of the matter to a vote of the people. *Shelby County v. Exposition Co.*, 96 Tenn., 653, 36 S. W., 694, 33 L. R. A., 717; *State ex rel. v. Powers*, 124 Tenn., 553, 137 S. W., 1110, and cases cited.

Although the improvement of a particular street may confer a peculiar benefit upon the property owners along that street—so peculiar, indeed, as to justify a special assessment upon them—the improvement is none the less a public improvement. In this case the expenditure is to be made on the city's own easement, its street, of which it had, and retains, control, and of which all its citizens have the benefit.

If a municipality could be restrained in the execution of a proper corporation purpose because some of its citizens would derive special advantage therefrom, many of its enterprises would fail. Parks, schools, bridges, and numerous other public works benefit chiefly the immediate section in which they are located.

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It cannot be said that a municipal improvement falls short of a corporate purpose because all its benefits are not, in fact, enjoyed by all the citizens in the same degree.

The improvement of a city's streets is an improvement of a public nature, an improvement of the city's own property, the enjoyment of which is not confined to adjacent property owners. That adjacent owners derive special advantage therefrom sufficient to justify the levy of a special assessment upon them does not alter the case. The work is still of a public character, and expenditures for the same are expenditures for a corporation purpose.

To deny the public character or the corporate purpose of work accomplished by local assessments would be to deny the power of a municipality to execute such an undertaking at all. Unless such work were for the public benefit or for a corporation purpose, citizens could not be required to submit to assessments on account thereof. The property of adjacent owners could not be so burdened against their will, however much it might be improved or enhanced in value.

So we must conclude that the prosecution of this improvement work on its streets by the city of Bristol is for the benefit of the public, and that the use of the credit of the city for such work is for a legitimate corporation purpose, notwithstanding the fact that some property owners will be specially benefited.

The case of *Colburn v. Railroad*, 94 Tenn., 43, 28 S. W., 298, in no sense conflicts with the views herein ex-

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pressed. In that case the county undertook to use its credit, as the court pointed out, for the purpose of becoming a stockholder and joint owner with the railroad company in proposed improvements. In this case the city of Bristol proposes to use its credit for the improvement of its own streets, of which it has exclusive control.

The chancellor correctly sustained the city's demurrer, and his decree will be affirmed, with costs.

C., N. O. & T. P. Ry. Co. v. Roddy.

CINCINNATI, N. O. & T. P. Ry. Co. v. RODDY *et al.**

(Knoxville. September Term, 1915.)

1. LIMITATION OF ACTIONS. Flowage. Damages. Continuing damages.

Where a railroad ditch along the right of way is allowed to fill up by the road's negligence, throwing water upon plaintiff's lands, depositing gravel and cinders, a distinct right of action arises with each wrongful act in the overflow or submergence of plaintiff's lands due to the railroad's negligence in failing to keep open the ditch. (*Post*, pp. 570, 571.)

Cases cited and approved: Carriger v. Railroad, 75 Tenn., 388; Railroad v. Higdon, 111 Tenn., 124; Silsby Manufacturing Co. v. State, 104 N. Y., 569; McConnell v. Kibbe, 29 Ill., 485; Gabbett v. Atlanta, 137 Ga., 180; Knapp v. New York, etc., R. Co., 76 Conn., 311.

2. LIMITATION OF ACTIONS. Flowage. Damages. Limitations.

Where defendant railroad, by allowing the ditch along its road-bed to become filled up, periodically inundated plaintiff's adjacent lands, depositing gravel and cinders, the only damages recoverable were those caused by the deposit of gravel within the period of the statute of limitations, taking the value of the land at beginning of the period as normal, although it was then covered with gravel deposited by previous floodings, as to which plaintiffs' causes of action were barred. (*Post*, pp. 571-575.)

Cases cited and approved: Railroad v. Brigman, 95 Tenn., 624; Love v. Railroad, 108 Tenn., 122; Railroad v. Matthews, 115 Tenn., 172.

Cases cited and distinguished: Pickens v. Coal River Boom, etc., Co., 66 W. Va., 10; Lentz v. Carnegie Bros. & Co., 145 Pa., 612.

*As to when the statute of limitation begins to run against action for damages to land on account of obstructing stream or surface water see notes in 20 L. R. A. (N. S.), 886. 25 L. R. A. (N. S.), 645.

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FROM RHEA.

Appeal from the Circuit Court of Rhea County.—
FRANK L. LYNCH, Judge.

WRIGHT & JONES, for appellant.

GIVENS & RHEA, for appellees.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was commenced July 14, 1914, by B. W. and M. S. Roddy against the railway company to recover damages done to a tract of land through which the defendant's roadbed is constructed, it being alleged that a ditch made by the company along its right of way for the protection of the plaintiffs' farming land by negligence was allowed to fill up, thus throwing the flow of water out on their land and causing a deposit of sand, gravel, and cinders to form thereon to its injury.

The defendant company filed a plea of the statute of limitation of three years, applicable to injuries to realty.

Plaintiffs' own proof showed that the land was thus caused to be abandoned as unfit for usual tillage about fifteen years before the suit was brought; that all of this land continued to be usable for pasturage until about two years before the trial, when a part of same

became wholly unfit for any purpose, while another portion yet remained capable of use for grazing purposes. The condition grew worse as the land was overflowed from time to time and as the deposits were made over its surface.

The court of civil appeals properly reversed the judgment of the circuit court on account of the charge of the trial judge being too meager, contradictory, and confusing, and the cause was remanded for a new trial.

The only question discussed before us is the proper measure of damages to be applied in the retrial in the court below in view of the plea of the statute of limitation.

The court of civil appeals held that the measure of plaintiff's damages "is the reasonable rental value of the land during the three years next preceding the institution of this suit; that is, such rental value as they would have realized from it had the original wrong never been committed."

The case clearly falls within the rule of recurrent or continuing damages in force in this State under which a distinct right of action arises with each wrongful act in the overflow or submergence of plaintiffs' lands due to the negligence of the railroad company in failing to keep open the ditch. *Carriger v. Railroad*, 7 Lea (75 Tenn.), 388, 396; *Railroad v. Higdon*, 111 Tenn., 124, 76 S. W., 895.

Many cases lay down in broad terms the further subsidiary rule that so long and as often as such a recurrent cause of action arises the plaintiff is not barred

by the statute of limitation of a recovery for such damages as have accrued within the statutory period, although a cause of action based solely on the original wrong may be barred; the recovery in such case being limited to such damages as accrue within the statutory period before action brought. *Silsby Manufacturing Co. v. State*, 104 N. Y., 569, 11 N. E., 264; *McConnell v. Kibbe*, 29 Ill., 485; *Gabbett v. Atlanta*, 137 Ga., 180, 73 S. E., 372; *Knapp v. New York, etc., R. Co.*, 76 Conn., 311, 56 Atl., 512, 100 Am. St. Rep., 994; 25 Cyc., 1138.

The difficulty experienced by the court of civil appeals was in determining what "damages accrue" within the period of three years limited by the statute under the above rule which it recognized. The holding of that court finds support in what was said by way of argument in the case of *Pickens v. Coal River Boom, etc., Co.*, 66 W. Va., 10, 65 S. E., 864, 24 L. R. A. (N. S.), 354. In that case it appeared that the defendant had so erected its boom below plaintiff's property as to cause sedimentary deposits of sand to accumulate in the stream to the damage of plaintiff's mill property. The court held to the doctrine of recurrent injuries and that the statute of limitations began to run, not from the construction of the boom, but from the date when the damages accrued, and, further, that sediment so deposited within a period earlier than the period saved for action by the statute (five years for damages to realty in that state) was to be deemed an element operating to effect damages accruing with-

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in the period limited by statute. It was said by the court:

“It is not material when the sand was deposited creating that condition which caused the damage. That condition or state of the stream coming from the construction of the boom, and that condition still continuing entitling Pickens to recovery, how is it material when the sand was deposited so it continued to work damage within the five years for which this suit was brought? . . . Pickens had the right to operate his mill in its original condition not only during the five years involved in the first suit, but also during the five years involved in the second suit, . . . and it is utterly immaterial when that sand was deposited, so it continued to operate in diminishing the working capacity of the mill.”

We need not stop to inquire how the working capacity of a mill property, if the deposit were made on the plaintiff's property, can be distinguished in that attitude from the capacity of farm lands to produce crops, but the above case may be fairly said, in its argument at least, to sustain the judgment here under review. But is that case, if sound on its immediate facts, sound in its argumentation in the respect indicated or as applied to a case like this?

In *Lentz v. Carnegie Bros. & Co.*, 145 Pa., 612, 23 Atl., 219, 27 Am. St. Rep., 717, the plaintiff was the owner of a farm a part of which was along a creek into which defendants habitually dumped slate and slack depending upon the current and floods to carry it past

plaintiff's land and away. Beginning about twenty-five years before the commencement of the suit, the dumped materials by degrees were deposited on the land to its material injury. These deposits continued to be made within the statutory limitation period—six years in that State. The court held that the questions thus presented for jury determination were: What was the condition of the land of plaintiff six years before the writ was issued? Was it covered by the deposit complained of? Whether the situation had been made worse during the six years, and to what extent? Giving, as a reason why the measure of damages adopted by the court below was inapplicable, that it allowed a consideration by the jury of the land's value in its original condition, that is, before the deposits began to form, the court said:

“The defendant had pleaded the statute of limitations, and the inquiry was thereby limited to six years. The comparison which the testimony placed before the jury carried them back to a time when the stream was not polluted, and the slate and slack had not been deposited on the plaintiff's land. It brought to their notice, not the injury done in six years, but the changes made from the beginning of operations on Brush creek, which was nearly or quite a quarter of a century before the trial. While the learned judge told the jury that the plaintiff could not recover for an injury sustained more than six years before his action was begun, he permitted testimony to be given which brought the entire change in the situation of the plaintiff's flat

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land to their attention and which contrasted its value in its original condition with its value in its present condition.”

This was held to be error.

The ruling on the point in any case that is to the contrary of the doctrine thus announced by the Pennsylvania court, we think, disregards a fundamental principle in the law of torts, viz.:

“A single tort can be the foundation for but one claim for damages. . . . All damages which can by any possibility result from a single tort form an indivisible cause of action. Every cause of action in tort consists of two parts, to wit, the unlawful act, and all damages that can arise from it. For damages alone no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be maintained. There must be a fresh act, as well as fresh damages.” 1 Freeman on Judgments, sec. 2111; *Railroad v. Brigman*, 95 Tenn., 624, 32 S. W., 762; *Love v. Railroad*, 108 Tenn., 122, 65 S. W., 475, 55 L. R. A., 471; *Railroad v. Matthews*, 115 Tenn., 172, 91 S. W., 194.

For these reasons, in cases such as the one under review, the cause of action is not referable to the original obstruction of the ditch, but to the subsequent several recurrent tortious acts of overflow which affected injuriously the lands of the plaintiff, as fresh acts giving rise to fresh damages.

Each trespass or fresh tortious act thus producing injury constitutes a cause of action, and this is suscep-

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tible of being barred by the statute of limitations. When, for example, an overflow occurs on a date prior to the period of limitation, that wrongful act and equally its result, the damage done, are barred when the applicable statute is pleaded.

It is illogical, therefore, to treat such items of injury or damage as projected forward into the period of limitation as being themselves factors contributing to further injuries, as acts of wrong, since they are but the result of precedent acts, confessedly barred. When a cause of action is barred, it is barred in its entirety, not as to only one of the two elements of which it thus consists. The statute puts at repose all that preceded its period that was actionable.

The court of civil appeals was in error on this point, and its judgment will be modified, and the cause be heard on the remand in accordance with the ruling embodied in this opinion.

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WHITTAKER v. LOUISVILLE & N. R. Co.

*(Knoxville. September Term, 1915.)***1. JUSTICES OF THE PEACE. Pleading. Warrant. Sufficiency.**

In a suit against a railroad for personal injury on or near its tracks, begun before a justice of the peace, the warrant must sufficiently advise the defendant of the nature of the suit. (*Post*, pp. 578, 579.)

2. RAILROADS. Accident at crossing. Signals.

Under Shannon's Code, sec. 1574, subsecs. 1, 2, requiring the overseers of public roads to place at each railroad crossing a sign marked, "Look out for the cars when you hear the whistle or bell," and providing that no engineer need blow the whistle or ring the bell unless so designated, an engineer is not required to sound the whistle or bell at a crossing not designated by such sign. (*Post*, pp. 579, 580.)

Case cited and approved: *Graves v. Railroad*, 126 Tenn., 149.

Code cited and construed: Sec. 1674, subsec. 2 (S.).

3. RAILROADS. Accident at crossing. Pleading. Obstruction.

A count, in an action for personal injury, under Shannon's Code, sec. 1574, subsec. 4, providing that every railroad shall keep the engineer or fireman always upon the lookout, and when any obstruction appears the whistle shall be sounded, the brakes put down, and all possible means taken to prevent an accident, is a count under the common law, unless it was further charged that the person or object on the track was struck by the train, and by the addition of such circumstance the count is brought within Shannon's Code, sec. 1575, providing that every railroad failing to observe specified precautions shall be responsible for all resulting damage to persons or property, and section 1576, providing that no railroad observing such precautions shall be responsible for injury to persons on its road, so that where the

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warrant did not charge that the train struck the plaintiff or her wagon, and it appeared that she jumped from the wagon, the action was under the common law, and there was no absolute liability for failure to take the specified precautions. (*Post*, pp. 580-584.)

Case cited and approved: Railroad v. Crews, 118 Tenn., 52.

Cases cited and distinguished: Holder v. R. Co., 79 Tenn., 176; Railroads v. Sadler, 91 Tenn., 508; Railroad v. Phillips, 100 Tenn., 130.

Code cited and construed: Secs. 1574, subsecs. 2 and 4, secs. 1575, 1576 (S.).

4. RAILROADS. Accident at crossing. Instruction.

In an action for personal injury at a crossing brought under Shannon's Code, sec. 1574, subsec. 4, an instruction that it was the duty of the railroad on seeing plaintiff's wagon on or near the track, and in view of the train's speed of fifty miles an hour, to sound the whistle and endeavor to prevent an accident, was proper; but an instruction that plaintiff was entitled to recover because the engineer made no effort to stop even though no collision occurred was improper. (*Post*, p. 584.)

5. RAILROADS. Accident at crossing. Question for jury. Contributory negligence.

In an action for personal injury at a crossing brought under Shannon's Code, sec. 1574, subsec. 4, *held* on the evidence that it was for the jury to say whether plaintiff was negligent in jumping from the wagon instead of trusting her safety to the speed of the horses as the driver of the team did. (*Post*, pp. 584, 585.)

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—VON A. HUFFAKER, Judge.

Whittaker v. Railroad.

J. ALVIN JOHNSON and PICKLE, TURNER, KENNERLY & CATE, for plaintiff.

JOHNSON & COX and JAS. B. WRIGHT, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

This action was originally brought before a justice of the peace to recover judgment for an injury alleged to have been inflicted upon the plaintiff by the defendant. There was a judgment in favor of the plaintiff before the justice, and from this an appeal was prosecuted to the circuit court of the county. In that court there was likewise a judgment against the railroad company. An appeal was then prosecuted to the court of civil appeals, and the judgment of the circuit court was there reversed and the cause remanded for new trial. We are of the opinion that the conclusion reached by the court of civil appeals was correct, and that the judgment of that court should be affirmed.

We shall now endeavor to make clear our reasons for this conclusion.

Although the suit was begun before a justice of the peace, and, according to the practice before such officers, there was no declaration but only a warrant, yet this warrant was practically as full as the declaration in a circuit court, and necessarily so, inasmuch as under recent decisions of this court it has been held that the warrant must sufficiently advise the defendant of

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the nature of the suit brought against him in the class of cases before us.

The substance of the warrant is that Mrs. Whittaker, on a certain day stated, was in a wagon driven by one Luttrell; that before the horses entered upon the track of the defendant company the team was slowed down, and both plaintiff and Luttrell looked and listened, and neither saw nor heard a train; that when the horses had gotten upon the track she saw one of defendant in error's trains coming around a curve about five hundred feet distant and running very rapidly; that she urged the driver to speed up his team, but the train was coming so fast she feared they could not clear the track in time, and therefore she ran to the front of the wagon and jumped out on the ground, falling in the midst of some slag and other rough material on the side of the track whereby she was injured.

There is a paragraph in the warrant averring that the defendant failed to sound the whistle or bell of the locomotive at the distance of one-fourth of a mile from the crossing and at short intervals till the train had passed the crossing, pursuant to subsection 2 of section 1574 of Shannon's Code, and that this was one cause of the injury. This portion of the warrant, however, is no longer insisted upon because under subsection 1 of the same section, as held in *Graves v. Railroad*, 126 Tenn., 149, 148 S. W., 239, there was no duty incumbent on the railroad to comply with the provision referred to, because it did not appear in the evidence that the county warning ("Look out for the cars

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when you hear the whistle or bell'') had been erected at the crossing pursuant to said section 1. The section provided that no engine driver should be compelled to blow the whistle or ring the bell at any crossing unless so designated.

There was another paragraph based on subsection 4 of section 1574. This subsection reads as follows:

“Every railroad company shall keep the engineer, fireman, or some other person, upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.”

It was held in *Railroad v. Crews*, 118 Tenn., 52, 62-64, 99 S. W., 368, that a count under subsection 2 was a count under the statute, but that a count under subsection 4 was a count under the common law, unless it were further charged that the injury was caused by contact with the moving train, or, in other words, unless the object on the track or road should be struck by the train. The reason given was that the provisions of subsection 2 were peculiar to the statute, while those of subsection 4 simply expressed common-law duties. That is to say, that in so far as concerned the provisions of subsection 4 the statute and the common law are concurrent, and that in order to bring a count under the statute the additional circumstance above referred to should be added. By the addition of such further matter the charge is brought within the scope

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of sections 1575 and 1576 of Shannon's Code, which read as follows:

"1575. Every railroad company that fails to observe these precautions, or cause them to be observed, by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"1576. No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

In order to bring these sections into operation, it must appear that the obstruction or object on the road was actually struck by the moving train. It has been hitherto deemed that this point was fully settled by the case of *Holder v. R. Co.*, 11 Lea (79 Tenn.), 176. It is denied, however, by counsel in the present case, that the authority referred to settled the question. We need only refer to page 179 of the book in which the case is reported, where the question is stated thus:

"The question is whether the company shall be held liable for a loss to which, although the innocent cause, it in no way contributed, and which was not occasioned by a collision with its train."

This has been repeatedly referred to as settling the question. See *Railroads v. Sadler*, 7 Pickle (91 Tenn.), 508, 509, 19 S. W., 618, 30 Am. St. Rep., 896; *Railroad v. Phillips*, 16 Pickle (100 Tenn.), 130, 42 S. W., 925.

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If there be any doubt remaining after the citation of these cases, it cannot persist in the face of the following quotation from a more recent case:

“The first error assigned is that there is no evidence to sustain the verdict.

“This must be sustained. According to the testimony which the defendant in error, himself, gave upon the trial below, he was walking down the track at a point where he could have been seen for quite a hundred yards, but he was not seen, or if seen by the lookout upon the engine, none of the statutory precautions were complied with; the first warning he had was the glare of the headlight when the engine was almost on him; he sprang suddenly to one side, and cleared the track, but his foot slipped on the slag with which the track was ballasted; this caused him to fall backwards, and in some way his hand fell under the wheels and was severed from his arm a little ways above the wrist. He was not struck by the engine or any portion of the train; his hand and arm were simply run over in the manner stated. The company was negligent in not complying with the statutory precautions. The defendant in error was negligent in being upon the track at all, and using it as a passway at ten o'clock at night. He was especially negligent because he went upon the track at that time of night in the physical condition he then was in, that is, considerably under the influence of intoxicating drink, and defective in eyesight, and also in hearing. Moreover, it is apparent from his testimony that he was looking down at his feet as he walked

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along picking his way, and was not either looking or listening for a train.

“The statute (Sh. Code, sec. 1575) provides that any railroad company that fails to comply with the precautions laid down in the preceding sections shall be responsible for all damages to person or property ‘occasioned by or resulting from any accident or collision that may occur.’

“This statutory rule has been administered by this court with great strictness, nor do we in anywise desire to depart from the policy of the law as evidenced in our previous decisions. But it has not been held in any case, that there could be a recovery where there was no collision on the track, or within the sweep of the moving train. Here, there was no collision. The defendant in error had cleared the track and, after doing so, threw his hand back under the wheels of the passing train. This was not a collision in the sense of the statute. It is true that the railway company was grossly negligent, and so was the defendant in error; but no matter how negligent the railway company is, in this class of cases, its liability is conditioned upon a collision. If there is no collision, there is no liability. If there is a collision, and the railway company fails to show that it complied with all the statutory precautions, it is liable for some damages, no matter how negligent the injured party was; such is the result of our decisions. But it could not be held, under the section of the Code referred to, that, if a trespasser upon the track of a railway company seeing the train

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coming and close upon him should jump off and break his leg, the company would be liable, on the ground that it did not comply with the statutory precautions. Here there would be an absence of liability because of the absence of a collision. But we need not further illustrate or discuss the matter, but sum up our views upon the question with the statement that on grounds of public policy the statute should be strictly enforced in all cases to which it applies, but should not be invoked, at all in cases to which it does not apply." *Va. & S. W. Ry. Co. v. James S. Richardson*, Mss., Knoxville, September term, 1904.

The warrant in the present case does not charge that the train struck the plaintiff, or even the wagon in which she had been riding. As a matter of fact, it appeared in the evidence that after the plaintiff jumped out of the wagon it cleared the track before the train reached the crossing, but only by the space of about eighteen inches.

The case was thus not under the statute, but under the common law; notwithstanding this, however, the trial judge charged the substance of section 1575 which made a case of absolute liability on failure to comply with the precautions. He thus, in effect, told the jury that, even though there had been no collision with the train, yet there was an absolute liability. This was clear error, and for this the court of civil appeals rightly reversed the judgment.

As the case, however, must go back for a new trial, it is proper to say that the circuit judge committed no

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error in charging the substance of subsection 4 of section 1574. It was the common-law duty of the railroad company, on seeing the wagon on the track, so near, and especially in view of the great speed at which the train was going—50 miles an hour—to do the things prescribed in that subsection. If an effort had been made to stop the train, it is very probable that the plaintiff would not have felt the necessity of jumping out of the wagon as she did, since she would have seen a better hope of escaping injury in the additional time thus allowed the wagon to clear the track. It was for the jury to say whether, under all the circumstances, she acted with reasonable prudence and caution; that is to say, whether she was reasonably justified in springing from the wagon instead of trusting her safety to the speed of the horses, as the driver did. The trial judge should not in effect, have told the jury that, even though no collision resulted, she was entitled to a verdict merely from the fact that the engine driver made no effort to stop the train.

What we have said fully disposes of the first assignment of error filed by the plaintiff in this court showing that it is not well taken.

The second assignment is immaterial.

Let the judgment of the court of civil appeals be affirmed, and the case remanded for new trial.

A copy of this opinion will go down with the *procedendo*.

American Zinc Co. v. Graham.

AMERICAN ZINC CO. v. D. F. GRAHAM.*(Knoxville. September Term, 1915.)***1. MASTER AND SERVANT. Safe place to work. Mines. Statute.**

Laws 1903, ch. 237, sec. 28, requiring that the buckets used in mines shall be covered and that there shall be certain structures inside the shaft so as to make the ascent and descent of employees safe, applied to a mine not fully in operation, which had sunk a shaft more than 250 feet, from the foot of which ran a drift to an old shaft, intended as a means of conducting air into the mine, and which was used by the employees in going to and returning from their work. (*Post*, p. 589)

Acts cited and construed: Acts 1903, ch. 237, sec. 28.

2. MASTER AND SERVANT. Safe place to work. Mines. Statute. Contributory negligence.

In such case a servant, knowing that the master had failed to comply with the statute requiring certain structures inside the shaft to make it safe for employees going up and down, did not assume the risk; and the fact that the statute fixed a penalty for its violation did not exclude his action for damages. (*Post*, pp. 589-591.)

Cases cited and approved: *Streeter v. Western Wheel Scraper Co.*, 254 Ill., 244; *Fitzwater v. Warren*, 206 N. Y., 355; *Curtis Cartside Co. v. Pribyl*, 38 Okla., 511; *Poli v. Numa Block Coal Co.*, 149 Iowa, 104; *Low v. Clear Creek Coal Co.*, 140 Ky., 754; *Narramore v. Railroad*, 96 Fed., 298.

3. MASTER AND SERVANT. Master's negligence. Violation of statute.

A master's violation of the terms of a statute requiring structures to secure safety in mine shafts was negligence *per se*, and made him responsible for all injury suffered as a direct consequence thereof. (*Post*, p. 591.)

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Cases cited and approved: Queen v. Dayton Coal & Iron Co., 95 Tenn., 458; Riden v. Grimm Bros., 97 Tenn., 220; Railway v. Haynes, 112 Tenn., 712; Adams v. Iron Co., 117 Tenn., 470.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—VON A. HUFFAKER, Judge.

PICKLE, TURNER & KENNERLY, for plaintiff.

CORNICK, FRANTZ, McCONNELL & SEYMOUR, for defendant.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Graham sued the zinc company to recover damages for an injury received by him while being drawn up a mine shaft belonging to the company. He recovered a judgment in the circuit court of Knox county for \$500, and on appeal to the court of civil appeals that judgment was sustained. The case was then brought here by the writ of *certiorari*.

Plaintiff in error, the zinc company, is the owner of a zinc mine, and also a factory for reducing the ore. At the time the injury occurred the factory had not been built, nor had the mine been put fully in operation. A shaft had been sunk to the depth of more than two hundred and fifty feet. From the foot of this

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shaft a drift was run to the location of an old shaft on the property with a view to drilling upwards and reaching the bottom of that shaft, thus connecting the two. This was intended as a means of properly conducting air into the mine. The rock and ore broken down in the course of running the drift were carried up through the new shaft by a metal bucket drawn over a windlass propelled by steam. In the same manner the employees of the company working in the mine were drawn to the surface. When employees were to be drawn up, notice was given by a servant of the company standing at the foot of the shaft by means of a wire connected with a bell at the surface; three taps being given to indicate that an employee was entering the bucket. The wall of this shaft was not protected in any manner, but was in the state left by the excavation. The Acts of 1903, ch. 237, sec. 28, requires that certain protections shall be furnished for the security of employees. One of these is that the bucket shall be covered; another is that there shall be certain structures inside the shaft to make-safe the ascent and descent of the employees. None of these requirements were complied with. The reason assigned by the company is that they wanted first to make the air connection complete and that they could not do both at once. It is also insisted that the mine was not complete, and that the statute did not apply to an incomplete mine. The plaintiff in error, while being drawn up through this shaft, was considerably injured by striking against the walls caused by the swinging of the bucket.

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The first question to be determined is whether this statute applies to a mine incomplete in the respects herein stated. We are clearly of the opinion that it does. There is the same reason for protecting the miners going up and down the shaft in an incomplete mine as in one that is complete. The shaft itself was complete, except the building of the structures therein which the statute requires. This shaft had been put down some weeks, and, as already stated, the miners were then engaged in running a cross entry or drift from the foot of it. Of course, they had to go down this shaft in getting to their place of work on the drift, and at night had to be transported up the shaft to their homes. There was as much need to them of this protection as there ever could be.

The second inquiry is whether the miner assumed the risk of the situation, knowing, as he did, that the plaintiff in error had failed to comply with the statute. To hold that he did assume the risk would be equivalent to a repeal of the statute, since it would be a continuing invitation to the company to forbear compliance with its provisions. The statute was passed under the police power of the State for the purpose of protecting those who are unable to protect themselves, occupying as they necessarily do a position much inferior in financial security to that of their employers; the physical necessity of themselves and their families making it essential that they should have work in order to secure the means of sustenance. It would defeat this beneficent purpose if it should be admitted as a

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sound principle that a failure of the employer to obey the statute could be condoned by the employee. Such a conclusion would place the employer in the position of power which only the legislature should occupy, since it would enable him to either destroy or maintain the policies of the State according to his own will and purpose. Moreover, it would be inconsistent to admit a mutual regulation by employer and employee of a matter which had been deemed of sufficient importance to require an act of the legislature to express a specific State policy. Such acts being passed to define rights and duties for the better regulation of business, and hence indirectly for the better regulation of society, must be sustained. They are not amenable to the doctrine of assumption of risk for the reasons we have stated, since a contrary decision would result in the courts loosing that which the legislature has bound. Nor is the result changed by the fact that the statute fixes a penalty for its violation. The doctrine that the assumption of the risk does not apply is in harmony with the purpose of the penalty, and there is nothing in the act to indicate that the penalty was exclusive of the employee's right to maintain an action for damages. The views herein expressed are sustained by the great weight of authority in this country. The question has never before been discussed in this State, so far as we are aware, yet has received much discussion in other jurisdictions. The cases are very numerous and will be found in the cited cases themselves and the notes to the cases. *Streeter v. Western Wheel Scraper Co.*,

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254 Ill., 244, 98 N. E., 541, 41 L. R. A. (N. S.), 628, Ann. Cas., 1913C, 204, and note; *Fitzwater v. Warren*, 206 N. Y., 355, 99 N. E., 1042, 42 L. R. A. (N. S.), 1229, and note; *Curtis-Cartside Co. v. Pribyl*, 38 Okl., 511, 134 Pac., 71, 49 L. R. A. (N. S.), 471, and note; *Poli v. Numa Block Coal Co.*, 149 Iowa, 104, 127 N. W., 1105, 33 L. R. A. (N. S.), 646, and note; *Low v. Clear Creek Coal Co.*, 140 Ky., 754, 131 S. W., 1007, 33 L. R. A. (N. S.), 656, Ann. Cas., 1912B, 574; *Narramore v. Railroad*, 96 Fed., 298, 37 C. C. A., 499, 48 L. R. A., 68.

We have several cases in this State which hold that a violation of the terms of a statute is negligence *per se*, and renders the person guilty of such conduct responsible for all injuries which may be suffered as a direct consequence thereof among which are *Queen v. Dayton Coal & Iron Co.*, 95 Tenn., 458, 32 S. W., 460, 30 L. R. A., 82, 49 Am. St. Rep., 935; *Riden v. Grimm Bros.*, 97 Tenn., 220, 36 S. W., 1097, 35 L. R. A., 587; *Railroad v. Haynes*, 112 Tenn., 712, 81 S. W., 374; *Adams v. Inn Co.*, 117 Tenn., 470, 101 S. W., 428. But we have no case on the narrow point covered by the preceding discussion and the authorities cited thereunder. However, in *Adams v. Inn Co.*, the same principle was applied to the case of a boarder at a hotel which, at the time of its destruction by fire, had not been equipped with fire escapes as required by statute.

We find no error in the judgment of the court of civil appeals, and it must be affirmed.

Turner v. Turner.

REUBEN S. TURNER *v.* G. S. TURNER *et al.*

(Knoxville. September Term, 1915.)

1. LIFE ESTATES. Lessees of life tenant. Rights of.

Under Shannon's Code, sec. 4184, providing that, where a life tenant shall lease the estate and die before expiration of the lease the rent may be apportioned between his representative and the remainderman, a life tenant cannot create a lease on land which will extend beyond the life estate, the remainderman not joining; for the remainderman is entitled to share in the rental *sum pro tanto* under the statute or to disaffirm. (*Post*, p. 594. 595)

Acts cited and construed: Acts 1877, ch. 159.

Cases cited and approved: Arnold v. Hodges, 29 Tenn., 40; Collins v. Crownover (Ch. App.), 57 S. W., 357; Hoagland v. Crum, 113 Ill., 365; Carman v. Mosier, 105 Iowa, 367.

Code cited and construed: Sec. 4184 (S.).

2. LIFE ESTATES. Leases by life tenant. Disaffirmance by remainderman.

Where, after the death of a life tenant, the remainderman sought to recover possession of the land and compensation from lessees for use, there was no ratification of the lease within Shannon's Code, sec. 4184, authorizing an apportionment of rent. (*Post*, p. 594. 595)

3. LIFE ESTATE. "Emblements." Right to.

Where a life tenant, having leased the premises, died, and the remainderman did not recognize the lease, the lessee of the life tenant was entitled to the emblements, which are the crops of grain growing yearly, but requiring an outlay of labor or industry, without payment of any compensation for use of the land in harvesting the emblements (citing Words and Phrases, First and Second Series, Emblements). (*Post*, pp. 596-598.)

Cases cited and approved: Edgehill v. Mankey, 79 Neb., 347; Bradley v. Bailey, 56 Conn., 374.

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FROM COCKE.

Appeal from the Chancery Court of Cocke County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—A. N. SHOUN, Special Chancellor.

SIMERLY & SIMERLY, for plaintiff.

AILOR & CARTY, for defendants.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This is an action of unlawful detainer and to recover rent.

The mother of complainant was the life tenant of a tract of land which was leased by her authority to defendants for the year 1912. She died on June 2, 1912, and the bill was filed shortly thereafter by complainant, who was the remainderman.

The defendants, who are the lessees of the tenant for life, had sowed the land to corn, beans, and potatoes prior to June 2d, and in their answer they asserted their right to emblements.

The complainant set up a claim to compensation from the lessees for the use and possession of the land for the entire year of 1912, and sought a recovery thereof. The bill of complaint, moreover, alleged the falling in of the life estate, and that complainant became

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thereupon "entitled to the land and everything thereon," and prayed for the issuance of a writ of possession.

The court of civil appeals treated the case as one where complainant had recognized the right of the lessee to the premises, under the life tenant's contract, thus making applicable the provisions of section 4184 of Shannon's Code (Acts 1877, ch. 159) which is as follows:

"Where a tenant for life of real estate shall create a lease out of his said estate for one or more years, and shall die before the expiration of said lease, and before the term fixed for the payment of the rent, the rent may be apportioned, and the executor or administrator of said tenant for life may recover of the lessee, *pro rata*, according to the contract, and for the time said lessee had the use of the property until the death of said tenant for life."

That court, reversing the chancellor, rendered a decree in behalf of complainant for rents in accordance with the prayer of the bill. A review of its action is sought by writ of *certiorari* on the question of rents; the question of possession having been disposed of by an agreed order in the lower court.

It was competent for the complainant, as remainderman, to recognize or ratify that lease contract, and to thus share in the rental sum *pro tanto* under the statute, or to disaffirm. *Arnold v. Hodges*, 10 Humph., (29 Tenn.), 40. But we fail to see how in an effort to dispossess the subtenant and to recover for past use

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and occupation in his own right there was evidenced the ratification of the lease found by that court. The contrary is true. The complainant did not recognize the contract of rental as one validly made by or under the authority of the life tenant, nor the right of the lessee to remain in possession thereunder accounting in part to the personal representative of the life tenant.

The above-quoted statute was not intended to put it within the power of a life tenant to create a lease upon the land which would extend beyond the date of the falling in of the life estate, the remainderman not joining. This was held in the case of *Collins v. Crownover* (Ch. App.), 57 S. W., 357, in an opinion by the present chief justice, while on the bench of that court, which ruling was affirmed by this court.

At common law the lease contract of a life tenant terminated at his death. *Arnold v. Hodges*, supra; *Collins v. Crownover*, supra; *Hoagland v. Crum*, 113 Ill., 365, 55 Am. Rep., 424; *Carman v. Mosier*, 105 Iowa, 367, 75 N. W., 323.

The purpose of the act of 1877 was to correct the harsh and artificial rule of the common law to the effect that such a contract of lease was so far an entirety as that the rent so arising could not be apportioned; therefore that on the death of the life tenant in the course of the year before the due date for the rent his lessee might quit the premises and pay no rent to any one for the occupation. *Collins v. Crownover*, supra.

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What, then, were the rights of the respective parties, on the basis of the statute not being applicable?

The lessee of the life tenant clearly was entitled to emblements. 24 Cyc. 1070. Coke on Littleton states the rule broadly:

“So, therefore, if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain and determined by the act of God; and the same law is of the lessee for years of the tenant for life.”

See, also, *Edgehill v. Mankey*, 79 Neb., 347, 112 N. W., 570, 11 L. R. A. (N. S.), 688, and note.

Emblements may be defined to be such crops of grain, roots, and the like as grow yearly, not spontaneously, but by reason of an outlay of labor or industry in the sowing or planting in one part of the year, the recompense for which is to be the crop maturing in the later part of the same year. Words and Phrases, First, Series, 2359; Id., Second Series, 253.

The right to take emblements depends upon the fact of sowing or planting by the life tenant or lessee, and does not attach by reason merely of a preparation of the soil for planting. *Bradley v. Bailey*, 56 Conn., 374, 15 Atl., 746, 1 L. R. A., 427, 7 Am. St. Rep., 316; *Collins v. Crownover*, supra.

Where, as here, the life tenant makes a lease and dies before the expiration of the term, the lessee, if he has sown the land prior to such death for the production of *fructus industriales*, is entitled to emblements.

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The doctrine is said to rest partly on the idea of compensation, but chiefly upon the policy of encouraging agriculture by assuring the fruits of his labor to one who cultivates soil thus held by uncertain tenure. The doctrine allows the life tenant or his lessee the right of ingress and egress for the cultivation of the crop if growing, for its preservation, and for its removal at maturity.

The record does not disclose that the lessee did more than exercise this right.

Is the remainderman, who disaffirms the lease contract made by the life tenant, entitled to recover rent or compensation for such qualified use made of his land? This appears to be a problem on which the authorities differ. Plowden at an early day raised the question in *Queries* appended to *Plowden's Reports*, p. 239, and inclines to the view that the remainderman would be. Williams in his work on *Executors*, and Washburn on *Real Property*, raise the question, and refer to Plowden, but do not themselves venture an answer. Such a claim on the part of the remainderman is not well founded, in the opinion of Redfield in 3 *Redf. Wills*, 155, par. 5, and of Pingrey in 1 *Pingrey, Real Prop.*, sec. 308. We do not find any adjudication of the point by the courts. It would seem that the latter view best comports with the idea of compensation to the lessee that underlies the doctrine of emblements. It is not apparent that he would be encouraged to enter and cultivate under the uncertain tenure of a tenant for life if he be held subject to be called

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to pay the remainderman for the qualified use a sum that is undetermined and indefinite as to amount.

However, this question does not stand for solution on the record. The complainant did not sue to recover for any such qualified use, nor did he adduce any proof as to the value of such a use.

In our view, the special chancellor, in disallowing rents as such, reached a correct result, and the court of civil appeals erred in not so ruling. Reversed. Decree here affirming the decree of the chancery court; all costs to be paid by complainant.

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OTTO STUDER *v.* W. H. ROBERTS.

(Knoxville. September Term, 1915.)

PROCESS. Summons. Amendment. Statutes.

Under Shannon's Code, sec. 4495, providing that new plaintiffs or defendants may be added to the suit by plaintiff upon supplemental process taken out and served, and section 4589, included in the same act, providing that the court may strike out and insert in the writ or pleadings the names of others as plaintiffs or defendants, process to bring in defendant after an amendment substituting plaintiff as administrator, instead of plaintiff in his own name, was not required, and a notification by the court's order, in place of formal process, was sufficient.

Acts cited and construed: Acts 1851-52, ch. 152, sec. 6.

Cases cited and approved: Love v. Railroad, 108 Tenn., 120;
Person v. Fidelity, etc., Co., 92 Fed., 965.

Case cited and distinguished: Flatley v. Railroad, 56 Tenn., 230.

Code cited and construed: Sec. 4495 (S.).

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
NATHAN L. BACHMAN, Judge.

J. H. EARLY, for plaintiff.

SIZER, CHAMBLISS & CHAMBLISS, for defendant.

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MR. JUSTICE WILLIAMS delivered the opinion of the Court.

This suit was brought by W. H. Roberts in his own name to recover damages for the alleged wrongful death of his daughter, Bessie Roberts, due to the carelessness of Studer in the operation of an automobile.

Thereafter Roberts moved for and was granted leave to amend the writ or summons and the declaration so as to add after his name the words, "as administrator of the estate of Bessie Roberts, deceased."

Thereupon Studer filed his plea in abatement setting forth that since the amendment of the suit and the substitution of W. H. Roberts, administrator, for the original plaintiff, he had not been served with process; which plea was stricken by the court on motion of the plaintiff below.

A plea in bar of "not guilty" was then filed, and the trial was proceeded with.

The court of civil appeals sustained this ruling on the plea in abatement and affirmed the judgment below.

The contention of Studer is that process to bring him in was required by Code (Shannon) section 4495, which is as follows:

"At any time before trial, new plaintiffs or defendants may be added to the suit by the plaintiff, upon supplemental process taken out and served, and subject to such terms in regard to costs as the court may impose."

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By another section (4589) it is provided that the court shall have power to strike out and insert in the writ or pleadings the names of either plaintiffs or defendants, so as to have the proper parties before the court. Both of the above provisions appear in the same legislative act, from which they were brought forward into the Code. Acts 1851-52, ch. 152, sec. 6.

In *Flatley v. Railroad*, 9 Heisk. (56 Tenn.), 230, it was said that previous to such legislative enactment the result of such a mistake as to the party plaintiff would have been to compel an abandonment of the action, but that this was obviated by the provisions before referred to, which allowed the name of a new plaintiff to be substituted. Judge McFarland said:

“The defendant being in court for a particular cause of action, it is not required that the expense and delay shall be incurred of new process.”

In *Love v. Railroad*, 108 Tenn., 120, 65 S. W., 475, 55 L. R. A., 471, this language was quoted with approval.

Counsel for Studer insist that what was said in these two cases was *obiter*, since the question involved in each was whether the amendment by way of substitution of a party plaintiff related to the date of the original commencement of the suit in respect of the running of the statute of limitation; and, further, that the court in no reported decision has passed upon the question when raised, as here, by a plea in abatement.

This may be true, but we are of opinion that the lan-

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guage used in the two cases above cited announced the correct rule.

The question was directly passed upon, in a case arising in this State, by the United States circuit court of appeals of the sixth circuit in the case of *Person v. Fidelity, etc., Co.*, 92 Fed., 965, 35 C. C. A., 117 (reversing [C. C.], 84 Fed., 759), where it was held that the amendment by substitution, as in the instant case, was permissible under section 4589, and effective.

The defendant was already before the court and cognizant of the amendment. In respect of an addition of a new party defendant at the instance of a plaintiff, there is room for the application of the words of section 4495, "upon supplemental process taken out and served," without a conflict between the two sections thus drawn from the same act; and these words are not to be deemed to prescribe a requirement as to the notification of a defendant in such circumstance of a change, by substitution in the plaintiff who may be prosecuting the cause of action. The notification by the court's order in the circumstances served in lieu of a notification by formal process.

Finding no reversible error on this or other points, the judgment of the court of civil appeals is affirmed.

Lauterbach v. State.

MAX LAUTERBACH v. STATE.*(Knoxville. September Term, 1915.)***1. HOMICIDE. Intent. Unlawful act. Negligence. Presumption.**

Where defendant, while driving an automobile in excess of twenty miles per hour, in violation of Pub. Acts 1905, ch. 173, killed a child who ran out in front of the automobile, he was guilty of felonious homicide, since he was negligent in violating the statute. (*Post*, pp. 605. 606.)

Acts cited and construed: Acts 1905, ch. 173.

Cases cited and approved: *State v. Campbell*, 82 Conn., 671; *State v. Goetz*, 83 Conn., 437; *Schultz v. State*, 89 Neb., 34; *Johnson v. State*, 61 L. R. A., 277.

2. HOMICIDE. Intent. Unlawful act. Presumption.

One who, while violating the law by speeding an auto, kills another is not relieved by the fact that the other ran in front of the auto, since he is presumed to anticipate the possibility of any result of his recklessness. (*post*, p 606.)

3. HOMICIDE. Defenses. Contributory negligence.

One who, while violating a law, kills another is not relieved by the negligence of the other, for the doctrine of contributory negligence does not apply to criminal acts. (*Post*, pp. 606, 607.)

Cases cited and approved: *Reg. v. Longbottom*, 3 Cox C. C. (Eng.), 439; *Reg. v. Kew*, 12 Cox C. C. (Eng.), 335; *State v. Moore*, 129 Iowa, 514.

4. CRIMINAL LAW. Trial. Conduct of counsel. Threats.

A statement of the prosecuting attorney that "if any one should run over a six years old child of his, he would take a cannon and shoot him," is improper, as calculated improperly to influence the jury. (*Post*, pp. 607, 608.)

Acts cited and construed: Acts 1911, ch. 32.

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5. CRIMINAL LAW. New trial. Discretion of court. Harmless error.

Under Pub. Acts 1911, ch. 32, providing that no judgment shall be set aside nor new trial granted for error, unless in the opinion of the appellate court it affected the result of the trial, new trial will not be granted where, in spite of the error, the judgment is sustained by the evidence. (*Post*, pp. 607, 608.)

FROM HAMILTON.

Appeal from the Criminal Court of Hamilton County.—S. D. McREYNOLDS, Judge.

LEWIS SHEPHERD and J. H. DALY, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General, for the State.

MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

Plaintiff in error was indicted in the criminal court of Hamilton county, for “unlawfully, feloniously, and recklessly” driving an automobile upon John D. White, and thereby causing his death.

“At the time,” continues the indictment, “said Max Lauterbach was driving said automobile along St. Elmo avenue, a public thoroughfare, at a rate of speed in excess of twenty miles an hour, and in disregard of the presence of said John D. White. Whereby the grand jurors present that the said Max Lauterbach has committed involuntary manslaughter,” etc.

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He was convicted and sentenced to an indeterminate period of from one to five years in the State penitentiary. He has appealed to this court and assigned errors.

The weight of the evidence shows that, on the occasion referred to, the plaintiff in error was driving his automobile at the rate of from twenty-five to forty miles an hour, as estimated by the various witnesses who testified. The weight of the evidence further shows that John D. White, a child six years old, was walking with his sister on the west side of the avenue, within the traveled way; there being no sidewalk at that point. His sister held him by the hand, but he suddenly jerked away just as the automobile was approaching, ran in front of it, and was killed.

Our Act of 1905, chapter 173, provides:

“That no automobile shall be run or driven upon any road, street, highway, or other public thoroughfare at a rate of speed in excess of twenty miles per hour.”

Section 6 of the same act makes the violation of any of the provisions thereof a misdemeanor punishable by a fine of not less than \$25, nor more than \$100. St. Elmo avenue is a much traveled street, in the town of St. Elmo, in Hamilton county.

It is insisted for plaintiff in error that, under the facts stated, his conviction was erroneous. We do not think so. His violation of the statute by running in excess of the speed limit there prescribed was negligence. One who kills another in the act of committing such negligence is guilty of felonious homicide. *State*

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v. *Campbell*, 82 Conn., 671, 74 Atl., 927, 135 Am. St. Rep., 293, 18 Ann. Cas., 236; *State v. Goetz*, 83 Conn., 437, 76 Atl., 1000, 30 L. R. A. (N. S.), 459; *Schultz v. State*, 89 Neb., 34, 130 N. W., 972, 33 L. R. A. (N. S.), 403, Ann. Cas., 1912C, 495. And the rule is general at common law that one who kills another while committing an act of negligence is guilty in like manner. See extended note to case of *Johnson v. State*, 61 L. R. A., 277 *et seq.*

The plaintiff in error is not relieved by the fact that the child ran suddenly in front of the machine. One who is engaged in the performance of an unlawful act must take the criminal consequences of whatever happens to third persons as a result of that act. It was his duty to anticipate that he might encounter, not only grown persons, but even little children, or even people who were afflicted with blindness or deafness. One who disobeys the statutory rule as to speed is acting in defiance of law, and must be held to have anticipated the possibility of any injury caused by his recklessness.

The little child was too young to be guilty of contributory negligence; but, even if it had been a person who had arrived at years of discretion, and he had committed an act similar to that of the child, the plaintiff in error would not have been free of criminal liability, since the rule of contributory negligence does not apply in criminal cases. *State v. Campbell*, *supra*; *Reg. v. Longbottom*, 3 Cox C. C. (Eng.), 439; *Reg. v. Kew*, 12 Cox C. C. (Eng.), 335; *State v. Moore*, 129

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Iowa, 514, 106 N. W., 16, and other cases cited in note to *Schultz v. State*, Ann. Cas., 1912C, 501 *et seq.*

An instruction was offered, in the trial court, to the effect that if the jury should find that the death of the child "was caused by his suddenly breaking loose from his sister and running into the automobile," the plaintiff in error could not be convicted. In response, the trial judge said:

"The court gives you that instruction, gentlemen of the jury, and further states to you this proposition again that if the reckless running of the machine caused the death of this child, then he is guilty; if it did not, then he is not guilty."

From what has been already said, it is apparent that there is no error in the foregoing of which the plaintiff in error can complain. In our judgment the instruction, as requested, should not have been given at all.

There were certain improper statements made by the district attorney general in his address to the jury, to the effect that if anybody should run over a six years old child of his, he would take a cannon and shoot him. On objection being made by counsel for plaintiff in error, the attorney general said that he knew that it was against the law to do such a thing, but he would do it. These were very improper statements, and should have been rebuked by the trial judge. We do not think, however, there should be a reversal on this ground. The conviction was thoroughly grounded on the evidence, and we do not think that these improper state-

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ments made by the law officer of the state influenced the verdict. This being true, we cannot reverse. Acts of 1911, chapter 32.

There being no error in the judgment of the trial court it must be affirmed.

City of Chattanooga v. Carter.

CITY OF CHATTANOOGA v. CARTER *et ux.**

(Knoxville. September Term, 1915.)

HUSBAND AND WIFE. Rights of husband. Services of wife.

The Married Women's Act (Laws 1913, ch. 26), which relieved married women from all disability on account of coverture, did not affect a wife's marital duties, and a husband, as at common law, may recover for loss of the services of his wife by reason of personal injuries sustained by her.

Acts cited and construed: Acts 1913, ch. 26.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—
NATHAN L. BACHMAN, Judge.

W. J. COUNTS and FORD & YARNELL, for plaintiffs.

COLEMAN & FRIERSON, for defendant.

MR. JUSTICE FANCHER delivered the opinion of the Court.

A recovery was had by C. H. Carter, the husband, for the loss of services of his wife by reason of personal injuries sustained by her. The judgment of the circuit court was sustained by the court of civil ap-

*As to right of husband to recover for loss of consortium through personal injury to wife see notes in 33 L. R. A. (N. S.), 1042, L. R. A., 1915D, 611.

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peals. It is assigned as error that no recovery can be had by the husband in such cases since the Married Women's Act of 1913, chapter 26, which provides as follows:

“That married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married.”

It is contended that this act is so broad in its provisions, and the emancipation is so complete, as to merge all rights of action arising from injuries to the wife into one right of action, vested in her.

The act in its caption is recited broadly to be:

“An act to remove disabilities of coverture from married women, and to repeal all acts and parts of acts in conflict with the provisions of this act.”

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At common law the wife was termed a feme "covert," and her condition during marriage was called her "coverture." Blackstone recognized two features of this coverture. One feature embraced personal rights; the other the rights of property. 1 Blackstone, Com., 442.

"Upon this principle of a union of person in husband and wife depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage." Id.

The act in question does not affect the legal rights and duties of that relationship further than to emancipate the wife from her disabilities that attached to the relationship. Embraced in these disabilities are her incapacity to act for herself with respect to her property, to make contracts, to bind herself personally, to sue and be sued. In fact, the wife was placed on that footing enjoyed by the husband as to the right to hold, manage, control, use, enjoy, and dispose of all property; to make any contract in reference to it and to sue and be sued.

The act does not deprive either the husband or wife of the conjugal relationship, with its duties and rights.

It results that there was no error in the action of the court of civil appeals in sustaining the judgment in favor of the husband, and it is affirmed.

Burroughs Adding Mach. Co. v. Fryar.

BURROUGHS ADDING MACHINE COMPANY v. SEVIER FRYAR.

(*Knoxville*. September Term, 1915.)

NEGLIGENCE. Owners of buildings. Duties to licensee. Police officer.

A police officer, observing a door of the defendant company to be open, while the room was unoccupied, went into the store, and when coming out closed the door with such force as to cause a screen over the transom to fall, injuring his foot. *Held*, that his acts, though in the performance of his duty, were those of a licensee, and that he could not recover for the injury, since a property owner is liable to a licensee only for willful injury.

Cases cited and approved: Lunt v. Post Printing & Pub. Co., 48 Colo., 316; Gibson v. Leonard, 143 Ill., 182; New Omaha Thompson-Houston Elec. Light Co. v. Anderson, 73 Neb., 84; New Omaha Thompson-Houston Elec. Light Co. v. Bensden, 73 Neb., 49; Casey v. Adams, 234 Ill., 350; Creeden v. Boston & M. R. Co., 193 Mass., 280; Lunt v. Post Ptg. & Pub. Co., 30 L. R. A. (N. S.), 60; Creeden v. Boston & M. R. Co., 9 Ann. Cas., 1121.

FROM HAMILTON.

Error to the Circuit Court of Hamilton County.—
NATHAN L. BACHMAN, Judge.

WATKINS & WATKINS, for plaintiff in error.

FLEMING & SHEPHERD, for defendant in error.

MR. JUSTICE GREEN delivered the opinion of the Court.

Defendant in error, Fryar, was a police officer in the city of Chattanooga. While making his rounds after

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business hours he noticed that the front door of the store of plaintiff in error was open. The officer went into the house to see if any one was there and, finding no one, concluded that the door had been left open by inadvertence. He returned to the front and, standing in a vestibule leading from the sidewalk into the storehouse, he slammed the door. The door fastened with a spring lock, and the jar occasioned by shutting it caused a screen, covering the transom to fall from its place onto the officer's foot, inflicting injuries for which he sues.

There was a verdict and judgment in favor of the plaintiff below. This judgment was reversed in the court of civil appeals, that court holding that a motion for peremptory instructions should have been sustained, and dismissed the suit.

The court of civil appeals was correct. The acts of the policeman in examining the premises and in closing the door were in the line of his duty, and the authorities are uniform to the effect that the owner of property is under no obligation to a policeman or fireman who goes thereupon in the discharge of his duty, except to refrain from inflicting upon such an officer a willful or wanton injury. That is to say, the officer is a quasi licensee, and the property owner owes him no duty to keep the premises in safe condition.

Under such circumstances a policeman or fireman goes on the premises by permission of the law. In the discharge of his duty to the public he may enter upon the premises in disregard of the owner's wishes. He

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is not an invitee. He may enter whether the property owner is willing or unwilling, and his right to enter does not depend on the property owner's invitation, express or implied, but his entry is licensed by the public interest and what has been called "the law of overruling necessity." Such is the law in the absence of some statute or ordinance. Cooley on Torts (3 Ed.), page 648; *Lunt v. Post Printing & Pub. Co.*, 48 Colo., 316, 110 Pac., 203, 30 L. R. A. (N. S.), 60, 21 Ann. Cas., 492; *Gibson v. Leonard*, 143 Ill., 182, 32 N. E., 182, 17 L. R. A., 588, 36 Am. St. Rep., 376; *New Omaha Thompson-Houston Elec. Light Co. v. Anderson*, 73 Neb. 84, 102 N. W., 89; *New Omaha Thompson-Houston Elec. Light Co. v. Bensden*, 73 Neb. 49, 102 N. W., 96; *Casey v. Adams*, 234 Ill., 350, 84 N. E., 933, 17 L. R. A. (N. S.), 776, 123 Am. St. Rep., 105; *Creeden v. Boston & M. R. Co.*, 193 Mass., 280, 79 N. E., 344, 9 Ann. Cas., 1121. See notes under *Lunt v. Post Ptg. & Pub. Company*, as reported in 30 L. R. A. (N. S.), 60, and also under *Creeden v. Boston & M. R. Co.*, as reported in 9 Ann. Cas., 1121.

The policeman was probably standing in the vestibule on the property of plaintiff in error, and not on the sidewalk, when he was injured. This is not a material question, however, because the injury resulted from an actual and indisputable entry on the property of plaintiff in error; that is, the reaching in, seizing, and slamming the door.

Accordingly the judgment of the court of civil appeals is affirmed.

Lunsford v. Johnston.

JAMES A. LUNSFORD *v.* ANDY JOHNSTON *et al.*

(Knoxville. September Term, 1915.)

PRISONS. Liability of superintendent. Torts of assistant.

The superintendent of a county workhouse, under Priv. Acts 1913, ch. 264, creating the office of road commissioners, and providing that one of them should be superintendent of the workhouse and employ its guards with the approval of his associates, was acting in an official or governmental capacity in employing a guard, and, where he was not present when the guard, whom he had told not to shoot any prisoner, shot and wounded a prisoner, attempting to escape, he was not liable in damages.

Acts cited and construed: Acts 1913, ch. 264.

Cases cited and approved: Casey v. Scott, 82 Ark., 362; Robertson v. Sichel, 127 U. S., 507; McKanna v. Kimball et al., 145 Mass., 555; Sawyer v. Corse, 17 Grat. (Va.), 230; Walsh v. Trustees N. Y. & Brooklyn Bridge, 96 N. Y., 427; Bowden v. Derby, 97 Me., 536.

FROM KNOX.

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—VON A. HUFFAKER, Judge.

CHARLES M. ROBERTS and W. B. FORD, for plaintiff.

MAYNARD & LEE and JOHNSON & Cox, for defendants.

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MR. JUSTICE FANCHER delivered the opinion of the Court.

This suit was brought by James A. Lunsford, as next friend for M. E. Lunsford, a minor, against Andy Johnston, superintendent of the workhouse for Knox county, Tennessee, Sam Hall, a guard, and others, to recover damages for personal injuries inflicted upon M. E. Lunsford, a prisoner at the workhouse, caused by the said Sam Hall shooting him while attempting to make his escape. Judgment was rendered against Sam Hall, but the suit was dismissed as to Andy Johnston and the surety company on his bond. The case was determined by the court of civil appeals upon an appeal to that court, where the judgment of the lower court was affirmed.

The case is before this court upon *certiorari*. The only error assigned is, in substance, that there is no evidence to support the judgment of the court.

The position of the plaintiff is that Andy Johnston, as superintendent of the workhouse, was not performing a governmental duty in the employment of Sam Hall as a guard, and that the relation of master and servant existed between them, and that therefore Johnston and his official bondsmen are liable in damages to M. E. Lunsford, because the law knows only the superior officer in such cases.

The proof shows that M. E. Lunsford was serving a workhouse sentence for a misdemeanor, and that he was shot by one Sam Hall, a guard at the Knox

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county workhouse, on June 19, 1914, while attempting to make his escape. Andy Johnston was superintendent of the workhouse, and also a member of the Knox county road commission. These road commissioners consisted of three members, Andy Johnston being superintendent, as stated. The act of the legislature creating the office of these commissioners, being chapter 264, Private Acts of 1913, provided that one of the commissioners should be known as the superintendent of the county workhouse, and that the guards for such workhouse should be employed by said superintendent, with the advice and approval of his associates.

The proof shows that Johnston was not present when the shooting was done, and that he knew nothing about it until afterward.

The defendant Sam Hall was employed by the road commission, or rather by the defendant Andy Johnston, with the advice and approval of his associates, pursuant to said act. These guards are paid for their services by the county, and are subject to the orders of the superintendent of the workhouse. Hall, therefore, was not a servant of the defendant Johnston at the time he did the shooting. Johnston was not acting in his individual capacity in selecting Hall as a guard, but in an official capacity and as an agent of the county in obedience to his statutory duty, and he was therefore performing a governmental duty. A public officer is not responsible for the wrongful act of a subordinate appointed by him under proper legal authority, unless he directed such wrongful act to be done, or is guilty

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of negligence in respect of same, which directly and proximately contributed to the injury. *Sherman & Redfield on Neg.* (6 Ed.), vol. 2, sec. 319; *Casey v. Scott*, 82 Ark., 362, 101 S. W., 1152, 118 Am. St. Rep., 80, 12 Ann. Cas., 184; *Robertson v. Sichel*, 127 U. S., 507, 8 Sup. Ct., 1286, 32 L. Ed., 203; *McKanna v. Kimball et al.*, 145 Mass., 555, 14 N. E., 789; *Sawyer v. Corse*, 17 Grat. (Va.), 230, 94 Am. Dec., 445; *Walsh v. Trustees N. Y. & Brooklyn Bridge*, 96 N. Y., 427; *Bowden v. Derby*, 97 Me., 536, 55 Atl., 417, 63 L. R. A., 223, 94 Am. St. Rep., 516.

Many other cases and authorities might be cited.

We think clearly under the well-recognized authorities on the subject that a public officer is not liable for the acts or omissions of his subordinates employed by him or working under his direction, unless they are acting in his private service, but these subordinates themselves are considered as servants of the government. We do not mean to hold that there would be no personal liability in cases of negligence or want of reasonable care in the selection of subordinates, but that question does not arise, inasmuch as no facts are shown proving a dereliction upon the part of Johnston in this respect. The defendant Hall was acting without any authority to do this act, but on the contrary in violation of instructions. He had been instructed by his superiors not to shoot any prisoner.

The rule upon which sheriffs are held to be liable for the acts of their deputies is based upon the fact that the deputy is acting in a personal capacity as the

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agent of his principal, and the act of the deputy is the act of the principal. In such case it is more nearly a personal employment by the sheriff than the selection of a public official. The relation of principal and agent can, in no sense, be found in the present case.

Affirmed.

Ridenour v. Woodward.

W. S. RIDENOUR *et al.* v. WILL WOODWARD.

(*Knoxville*. September Term, 1915.)

1. BAILMENT. Accommodation bailments. Degree of care.

A bailee for the accommodation of the bailor is answerable only for his gross negligence or bad faith, the degree of care being measured, however, with reference to the nature of the article bailed, (*Post*, pp. 623, 624.)

Cases cited and approved: Whitmore v. Haroldson, 70 Tenn., 312; Hotel Co. v. Holohan, 112 Tenn., 214; Marshall v. Railroad & Light Co., 118 Tenn., 254; Colyar v. Taylor, 41 Tenn., 372.

2. BAILMENT. Accommodation bailment. Liability of bailee.

Plaintiffs delivered money and checks to defendant salesman to carry to another town and deposit to their credit. Being warned by the bookkeeper of the house for which the salesman traveled as to danger of carrying the money to his house, he made it his custom to deposit the funds in an iron safe of a drug company, because he arrived at the place of deposit after banking hours. A deposit against which the merchants notified him they had drawn was placed in the drug company's iron safe, and, when the salesman who had been otherwise engaged called for it two days later, it had disappeared. *Held* that, as every parting with an article bailed will not work a conversion, the salesman was not guilty of converting the fund, though he did not deposit it the earliest possible moment. (*Post*, pp. 624-629.)

Cases cited and approved: Spooner v. Manchester, 133 Mass., 270; Fouldes v. Willoughby, 8 M. & W., 540; McNeill v. Brooks, 9 Tenn., 73; Harvey v. Epps, 12 Grat. (Va.), 153; Weller v. Camp, 169 Ala., 275; Kirtland v. Montgomery, 31 Tenn., 452.

Cases cited and distinguished: Jenkins v. Bacon, 111 Mass., 373; De Tollenere v. Fuller, 1 Mill, Const. (S. C.), 117; Christian v. First Nat. Bank, 155 Fed., 705; Cicalla v. Rossi, 57 Tenn., 67.

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FROM CAMPBELL.

Appeal from the Chancery Court of Campbell County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—HUGH G. KYLE, Chancellor.

OWENS & TAYLOR, for plaintiffs.

TEMPLETON & JENNINGS, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

W. S. Ridenour and C. C. Ridenour, a firm doing a mercantile business, brought this suit to recover \$400 and interest, alleged to be due them because of the failure of Woodward, as bailee, to deposit in the First National Bank, of Jellico, checks and money intrusted to him for deposit to their credit.

Woodward was a traveling salesman in the employ of Hackney & Company, a wholesale grocery establishment doing business in Jellico, and on his trips through the trade territory he was accustomed to call on and make sales to the complainant firm, the store of which was located at a small railway station about sixteen miles out from Jellico, which store was in charge of C. C. Ridenour.

Ridenour had from time to time, for a period of nine months preceding the incident that occasioned this

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litigation, sent money and checks by Woodward to Jellico to be deposited to the firm's credit in bank. Woodward made his trips from Jellico to the complainants' store by the railroad. The train's schedule for the return trip called for arrival at Jellico at seven-twenty at night, which was after banking hours. At the first Woodward began taking the money of complainant so intrusted to him to his home in the suburbs of Jellico, about one-fourth mile beyond the city limits and about one-half mile beyond the district where the streets were lighted; and the next day take the same to the bank for deposit or carry it to the establishment of Hackney & Company, his employers, and intrust it to the bookkeeper to be deposited in bank. Woodward was cautioned by this bookkeeper that there was danger of loss attending this method, and a change was made; Woodward taking the funds to some downtown store and depositing the same in an iron safe commonly used for the keeping of valuables. Several times he had used the safe of the Smith Drug Company for that purpose, and several times other safes. He testifies, without contradiction, that he had not uniformly delivered the money from the safe to the bank on the day next succeeding such lodgment, but that at times he delayed doing so for a day or two.

On the afternoon of July 22, 1912, which was Monday, C. C. Ridenour handed to Woodward for deposit the \$400 in question, which was placed that night in the safe of Smith & Company. His business called him from Jellico on Tuesday morning before banking hours.

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He returned in due course of the business of his employers on Tuesday night after banking hours. On Wednesday morning he again went to the store of Smith & Company without making inquiry as to the money, thence out of town on an early train for a short business trip, but returned to the city at ten forty-five, after the bank was opened, called at the drug store, and asked for the money that he had left there on Monday night, when on search of the safe it was discovered that the funds had disappeared. The testimony does not disclose what became of it, though it is found by both of the lower courts that it was not purloined by Woodward.

C. C. Ridenour informed Woodward at the time the funds were intrusted to him that he had drawn or was drawing checks on the bank against the same. Other facts are set out in the discussion which follows:

The court of civil appeals held that Woodward was liable to respond as for a conversion of the funds so lost. We have granted the writ of *certiorari* in order to a review of that decree.

The rule is that a bailee for the accommodation of the bailor is only answerable for his gross negligence or bad faith, the care to be taken by him to be measured, however, with reference to the nature of the thing placed in his keeping. *Whitemore v. Haroldson*, 2 Lea (70 Tenn.), 312; *Hotel Co. v. Holohan*, 112 Tenn., 214, 79 S. W., 113, 105 Am. St. Rep., 930, 2 Ann. Cas., 345; *Marshall v. Railroad & Light Co.*, 118 Tenn., 254,

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101 S. W., 419, 9 L. R. A. (N. S.), 1246, 12 Ann. Cas., 675.

The court of appeals was of opinion that the holding in the case of *Colyar v. Taylor*, 1 Cold. (41 Tenn.), 372, controls this case. In that case Taylor had received from a bank in Nashville money for Colyar to be delivered gratuitously at Winchester. After receiving the money, he took it to the public fair grounds in the vicinity of Nashville, where he met one Estill, who was prevailed upon to take charge of and make the delivery of the money. The money was counted out in public view, within a few steps of the promiscuous crowd, before it was passed to Estill. Shortly after Estill got upon the train, not far distant from the fair grounds, and soon after taking his seat discovered that his pocket had been picked. The ruling was that such parting of possession to Estill was a conversion since it was unauthorized, and also that there was gross negligence shown by the circumstances.

Accordingly, the court of civil appeals held that the placing of the intrusted funds in an iron safe of another person was without authority and constituted a conversion by Woodward.

It may be truly said that the earlier decisions go along rigid lines and show but slight, if any, disposition of the courts to indulge in inferences in favor of the bailee.

Clearly, it is not every parting with the possession by the bailee of the thing bailed that will work a conversion; there may be a parting that is qualified and

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temporary, evincing no intention on the part of the bailee to exercise a dominion over the same inconsistent with the right of the owner, but consistent with a further or continued control as to the delivery designated to be made by the bailee. *Spooner v. Manchester*, 133 Mass., 270, 43 Am. Rep., 514; *Fouldes v. Willoughby*, 8 M. & W., 540.

In *Jenkins v. Bacon*, 111 Mass., 373, 15 Am. Rep., 33, where the conclusion was a hard ruling of liability on the part of the defendant bailee charged with a conversion, it was yet conceded that:

If "for . . . sufficient reason it should become inconvenient or unsafe that he should retain the manual possession of the bond, he would undoubtedly be at liberty to deposit in any other place or mode, in which he . . . might deposit his own property of the like description. But, as between the original depositor and himself, he would continue to be the lawful and responsible custodian, and bound to practice that degree of care which the law requires of gratuitous bailees."

The court of civil appeals erred in not taking note of and following the trend of the modern authorities, which is to break away from the stern rules which many of the courts of England and of this country were at one time disposed to apply to acts of a bailee claimed to be a deviation, and therefore to effect a conversion.

Mr. Freeman in his annotations of the case of *De Tollenere v. Fuller*, 1 Mill, Const. (S. C.), 117, at 12

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Am. Dec., 616, 621, after citing with approval our case of *McNeill v. Brooks*, 9 Tenn. (1 Yerg.), 73, said:

“It is certainly a hard rule to hold that slight acts of misuser, by a bailee, of the thing bailed, are to be regarded as evidence of a permanent appropriation of the property to his own use. Perhaps a more reasonable doctrine is that of a majority of the court in *Harvey v. Epps*, 12 Grat. (Va.), 153, etc.”

Schouler, in his work on Bailments, remarks on this point that:

“The leaven of common sense, which keeps our law in constant ferment, is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability.”

The same writer, contending for a reasonable construction of the contract or undertaking of bailment, said that the same ought not to be too literally construed against a bailee who may have found himself obliged to act while away from the bailor, and forced to act on his own judgment; and that “the good sense of the contract should interpret favorably, where restrictive use was not clearly specified.” Schouler, *Bailments*, secs. 140, 141; *Weller v. Camp*, 169 Ala., 275, 52 South., 929, 28 L. R. A. (N. S.), 1106.

Particularly should this be true in cases of bailments for the accommodation of the bailor. The law should not be so technical and penalizing on the question of diversion or deviation as to discourage and check the

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doing of acts of accommodation by one person for another in the spirit of neighborly kindness.

In a case involving a claim of wrongful delivery to another person by a mandatary that amounted to a conversion (*Christian v. First Nat. Bank*, 155 Fed., 705, 84 C. C. A., 53), it was said by Van Devanter, Cir. J.:

“As is said by Schouler, in his work on Bailments (3 Ed., secs. 58, 63), ‘the courts are indisposed to extend by inference, the perils of an unprofitable trust,’ and ‘every bailee without reward ought to be given the least trouble consistent with his actual undertaking.’ This is in keeping with the rule that, when a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor.”

This modern tendency was exemplified in the holding of this court in the case of *Cicalla v. Rossi*, 10 Heisk. (57 Tenn.), 67. In that case money was the subject-matter of bailment for accommodation, the contract of which was evidenced by a written and signed memorandum as follows:

“Received from Giovanni Rossi the sum of five hundred and fifty dollars for safe keeps until he call for it.”

The bailee, Cicalla, instead of keeping the money in his immediate possession, deposited it in his own name in a bank in the city of Memphis that he considered safe but which later failed. The court, on the question of a conversion on the part of the bailee by reason of his making such a deposit, said:

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“The material point of controversy, and the one on which the case should turn, is whether or not the defendant in depositing the money in bank in his own name acted in accordance with the consent of the plaintiff, either expressly given or fairly to be implied from the circumstances and conversation had at the time.”

Applying these principles to the facts of the pending case: We think it manifest that Woodward acted with a fairly commensurate discretion when he placed the money and checks of the bailors in the iron safe for safe-keeping, and that by fair inference from all of the circumstances that action was in the interest of the bailors and consented to by them. They, themselves, in similar circumstances, had made like deposits in safes in Jellico overnight, which fact was known to Woodward at the time of the lodgment here in question. *Kirtland v. Montgomery*, 1 Swan (31 Tenn.), 452, 458.

The court of civil appeals was of the opinion that there was no excuse for Woodward not having the bookkeeper of Hackney & Company get the money on Tuesday morning and deliver it to the bank. But this quarrels with the very ground of liability of the bailee assumed by that court—that the mere act of parting with possession without authority to a third person for a consummation of the delivery would constitute a conversion. Moreover, Woodward explains that the bookkeeper was more than ordinarily busy with his own duties, it being near the close of the month when he was engrossed with his work as accountant.

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Much stress is laid upon the fact that the funds were allowed to remain in the safe until up into the second day, especially in view of the fact that Ridenour had informed Woodward that he was drawing checks upon the deposit thus to be built up. If the fund was not one converted by the act of the placing of it in the safe of another, this later circumstance would seem to be one only to be looked to in ascertaining the degree of care taken by the bailee. Did he hold the funds so long as to reach to gross negligence on his part?

It seems to us that in fairness the bailors must be deemed to have known that Woodward's first duty, on the day succeeding the deposit in the safe, was to his own employers, and that his service for their accommodation must have been accepted with the tacit understanding that Woodward's time was not his own. Was it reasonable for them to demand or expect that Woodward should give over carrying out his employers' schedule, mapped out for him for Tuesday, in order that the deposit should reach the bank before Wednesday? We think not. Clear it is that a case of gross negligence is not made out.

The decree of the court of civil appeals is reversed; decree here dismissing the bill of complaint at complainants' cost.

Lowry v. Southern Ry. Co.

MRS. ELIZA LOWRY *v.* SOUTHERN RAILWAY COMPANY.

(*Knoxville*. September Term, 1915.)

MASTER AND SERVANT. Action for injury. Sufficiency of declaration.

In an action for the death of plaintiff's intestate while in the defendant's employ as a yard inspector, the declaration averred that it was customary for employees in defendant's yard to go under cars on the track during showers; that there was a rule under the federal and State law and of the Interstate Commerce Commission, adopted by defendant, that before a standing car would be moved in the yard notice would be given; that defendant and deceased were engaged in interstate commerce; that while he was inspecting cars in the yard deceased went under the car during a shower; and that defendant, in violation of the rule, switched cars against the one under which intestate was, and killed him. *Held*, that the dismissal of the action for failure to comply with a motion to make the declaration more specific, and to designate the name of the vice principals, etc., alleged to have been negligent, and what rule had been violated, was erroneous, as the declaration set out with particularity and in a substantial way the cause of action on which plaintiff sued, and as such matters were more within the knowledge of the defendant.

Case cited and approved: *May v. Railroad*, 129 Tenn., 521.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County.—
NATHAN L. BACHMAN, Judge.

COOKE, SWANEY & HOPE, for appellant.

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G. W. CHAMLEE, for appellee.

MR. JUSTICE FANCHER delivered the opinion of the Court.

Plaintiff's intestate, Chas. J. Lowry, was killed in the yards of the defendant railway company on or about the 26th day of June, 1914, at Citico, near Chattanooga, while engaged as a yard inspector, track hand, and general repair servant for the defendant. Just previous to the accident he was inspecting a car, to ascertain if it needed attention of any kind, when a rain came up.

It is averred in the declaration that it was customary for the men working in the yards of the company to go under cars left standing on the tracks during a shower; that in accordance with this custom Lowry went under a car, in order to keep out of the rain. It is further averred that it was a custom of the railroad that, in case of cars coming into the yards, signals would be set up or orders given that the cars should be inspected while on the tracks before they were moved; that there was a rule, regulation, or system, provided by law, ordinances, and rules, that in case a car was rolled into the yard, and left standing, before that car would be moved, that notice would be given by the blowing of the whistle of the engine, the ringing of a bell, and giving general notice to the crew in and about the car that the same was going to be moved; that this rule was required by the federal and State laws, and by the Interstate Commerce Commission, and was cov-

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ered by a rule, regulation, or system adopted by the Southern Railway; that the deceased and the defendant railway company were at the time engaged in interstate commerce, or in commerce being transported from points outside of Tennessee, into Tennessee, through Chattanooga and the switchyards, where the deceased was working, and forward to other points outside of and beyond the State of Tennessee, and it was averred that the said Chas. J. Lowry, while so actively engaged in said duties, was ordered to make certain repairs on a switch in the yards, and to inspect certain box or freight cars, which necessitated his getting under the cars; that a certain train of the defendant company had come into the yards with broken chains, and a part of the apparatus necessary to keep the air brakes in good order was in defective condition; that while performing this repair work he stooped, with the view of getting under the car to make an inspection and immediately preceding this act it began to rain, and that while it was so raining there was no chance for employees to do very much in the way of work; that the defendant company violated and negligently disregarded each and all of the duties toward the deceased above enumerated, in that it failed to blow a whistle or give other warning that it was about to switch an engine to the train and move it, and that without notice, and without warning of any kind or character, the defendant railway company unlawfully, negligently, carelessly, and wrongfully moved an engine up to and against its train where the deceased was then engaged

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in such repair work, and caused its servants to move the train, and the wheels of such car or train ran over the body of Chas. J. Lowry, inflicting injuries from which he died.

Defendant moved the court to require the plaintiff to make her declaration more specific, and to designate the names of the alleged vice principals, foremen, or fellow servants who are alleged to have been careless, negligent, and unmindful of their duties; and, second, that plaintiff be required to make her declaration more specific, so as to allege and set out what particular rules and regulations for the prevention of accidents were violated by said vice principals, foremen, and fellow servants of the deceased. Whereupon the court ordered that the plaintiff make her declaration more specific upon these points, to which action she excepted, for the reason that the information required of her by this order is peculiarly within the knowledge and custody of the defendant itself. Plaintiff thereupon filed an amended declaration, but failed to comply with the order made upon her by the court, whereupon the defendant moved to dismiss the case, because of plaintiff's failure to so comply, and the court granted the motion, and dismissed the suit, to which action the plaintiff excepted, and appealed to the court of civil appeals. That court reversed the action of the trial judge and remanded the case to the court below for further proceedings.

We think the trial judge was in error in granting the motion of the railway company to require plaintiff to

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specifically point out the names of the servants who neglected their duty toward the deceased, and to point out specifically the rules and regulations which were required of it. The declaration was undoubtedly sufficient, in that it set out with particularity and in a substantial way the cause of action for which plaintiff sued.

In the case of *May v. Railroad*, 129 Tenn., 521, 167 S. W., 477, L. R. A., 1915A, 781, the present chief justice of this court pointed out proper rules of practice with respect to this question and reviewed former cases in this State upon the subject. The court reviewed somewhat at length the authorities from other jurisdictions upon this particular question.

We will not undertake to review the subject here. It is sufficient to say that this court recognizes the right in a proper case and upon the proper showing of a defendant to require the plaintiff to state with greater particularity as to time or other material averment, so as to give necessary notice to the defendant; and it is true that when so required plaintiff's suit will be dismissed if he fails to comply, unless he shows that he is unable to state the date or fix the particular facts more definitely.

Having in mind the rules of practice as stated in *May v. Railroad*, supra, we are of opinion that plaintiff should not have been required to comply with defendant's motion. This motion was not supported by anything, so far as the record discloses, showing any necessity for a more specific statement of the cause

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of action. The declaration on its face is full enough. The defendant does not show that it cannot prepare its defense without a more particular statement as to names of the persons who moved the train and the rules required of it, which it had adopted. The presumption is that the railroad would know more about these matters than plaintiff would. If persons bringing suits against railroad companies were required to comply with motions of this kind, in every instance, they would often fail in meritorious cases, because of their inability to point out by name the agents or servants whose negligence produced the injury, or to specifically state the exact wording of rules and regulations that were violated.

The declaration does state that the employees failed to sound a whistle, ring a bell, or pursue any other method of warning to the deceased that the cars were about to be moved. It states with sufficient certainty that there were rules requiring this. We think this was sufficient on the point in question to give the defendant reasonable notice of the grounds upon which the action was predicated.

The judgment of the court of civil appeals, in reversing the case and remanding it for further proceedings in the court below, is affirmed.

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WILLIAM CAUGHRON *et al.* v. J. B. STINESPRING *et ux.**

(*Knoxville*. September Term, 1915.)

1. VENDOR AND PURCHASER. Actions for deficiency. Evidence.

Evidence *held* to show that complainants purchased a farm by the acre and not in gross, and so could recover for deficiency in acreage. (*Post*, pp. 639-641.)

2. BROKERS. Liability of principal for broker's statements.
A landowner who makes a sale through a duly authorized broker is bound by the broker's statements as to the quantity of the land. (*Post*, pp. 641-643.)

3. VENDOR AND PURCHASER. Deficiency. Liability for.
Though purchasers of land visited the property itself and looked over the boundaries, the fact that they did not discover a deficiency of fifty-seven acres will not excuse the vendors, as the purchaser could hardly be expected to discover a shortage in a tract of six hundred acres. (*Post*, pp. 641-643.)

4. VENDOR AND PURCHASER. Deficiencies. Recovery.
Where a sale is in gross, no compensation will be granted for a deficiency, unless the deficiency is so great as to justify a conclusion of fraud or mistake equivalent to fraud, but if the sale is by the acre, the purchaser may recover for a deficiency at the agreed price per acre. (*Post*, pp. 643-645.)

Cases cited and approved: *Miller v. Bentley*, 37 Tenn., 671; *Seward v. Mitchell*, 41 Tenn., 89; *Barnes v. Gregory*, 38 Tenn., 230; *Horn v. Denton*, 34 Tenn., 125; *Deakins v. Alley*, 77 Tenn., 494; *Rich v. Scales*, 116 Tenn., 65.

5. VENDOR AND PURCHASER. Deficiency. Statements in deed.

To recover for misrepresentation as to the quantity of land conveyed, it is not necessary that the acreage be stated in a deed, but this may be shown by extrinsic evidence. (*Post*, pp. 643-645.)

*As to writ of *ne exeat* as imprisonment for debt see note in 34 L. R. A., 671.

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6. EVIDENCE. Parol evidence. Contract of sale. Deficiency. Recovery.

In a suit to recover for a deficiency in a parcel of land, the price per acre may be shown by parol, though not stated in the deed, the real contract between the parties governing. (*Post*, pp. 643-645.)

7. VENDOR AND PURCHASER. Deficiency. Actions. Evidence.

In a suit to recover for a deficiency in a parcel of land, parol evidence, showing the terms of the contract as to the price and number of acres, must be clear and certain; those matters not being stated in the deed. (*Post*, pp. 643-645.)

8. CONSTITUTIONAL LAW. Imprisonment for debt. Writ of *ne exeat*.

There was a deficiency in a parcel of land, which was sold by the acre. The vendor removed from the State and returned to collect notes for the purchase price. These were on his person. Shannon's Code, sec. 6246, authorizes the issuance of a writ of *ne exeat*. *Held*, that in such case, as the vendor might remove and negotiate the notes, thus depriving the purchaser of his remedies, the writ of *ne exeat* would issue; the issuance in such case not being equivalent to an imprisonment for debt prohibited by Const., art. 1, sec. 18. (*Post*, pp. 645-647.)

Cases cited and approved: *Smith v. Koontz*, 5 Tenn., 189; *Cresswell v. Smith*, 76 Tenn., 699.

Code cited and construed: Secs. 6092, 6093, 6246 (S.).

Constitution cited and construed: Art. 1, sec. 18.

9. NE EXEAT. Issuance of writ. Right to.

The writ of *ne exeat* will not issue for demands uncertain or contingent, and either the demand or its enforcement must be of an equitable nature. (*Post*, pp. 647, 648.)

10. NE EXEAT. Writ. Pleading.

A bill, praying the issuance of a writ of *ne exeat*, must by positive allegations or by facts showing the intention, set forth defendants' intended departure from the State and the probability of loss of rights. (*Post*, pp. 647, 648.)

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FROM McMINN.

Appeal from the Chancery Court of McMinn County.—V. C. ALLEN, Chancellor.

JONES & DAVIS, for appellants.

N. Q. ALLEN, for appellees.

MR. JUSTICE FANCHER delivered the opinion of the Court.

This suit was brought to recover damages for a deficiency in acreage in a tract of land conveyed by the defendants to complainants, upon the ground that the land was sold by the acre at an agreed price per acre. The original bill undertook a recovery, notwithstanding the fact that the deed of conveyance did not recite the sale by the acre, upon the ground that the original contract of sale entered into between the parties contemplated a sale by the acre, and that it is competent to look to the original contract; the deed being a mere evidence of the original agreement.

An amendment to the bill was filed later, seeking to reform the deed upon the ground that by mistake or fraud the instrument did not set forth the real contract of the purchase. The deed contained general warranties covenants of seisin, etc. It contains a description of the land by metes and bounds, except that

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on some of the lines the distance is not given; the calls being for lands of other owners or other objects.

The property in question, belonged to Mrs. Lou Stinespring, and the deed was executed by her and her husband, J. B. Stinespring to the complainants. The grantors were, at the time, living upon the land in question, located in McMinn county, Tennessee, and complainants were residents of Blount county, Tennessee. Most of the negotiations in regard to the sale were carried on between the complainants and one C. F. Keith, Jr., who was the agent of defendants, they having jointly authorized Keith to represent them in the sale of their farm and appointed him by written contract as their agent. In this contract the land was described as containing six hundred acres, of which four hundred acres was cleared and two hundred acres in timber.

Defendant Stinespring denies that he had any understanding that the land was sold by the acre, but the agent Keith, and both of the complainants, grantees in the deed, testified positively that the understanding was that complainants were buying six hundred acres of land at \$50 per acre.

The deed of conveyance does not set forth the amount of the purchase price, it appearing that Stinespring did not want to put on the face of the deed the consideration to be paid, and the purchasers probably did not want the deed to show the real consideration on account of a desire to keep the taxes as low as possible.

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The contract of agency was signed by both Mrs. Stinespring and her husband, appointing Chas. F. Keith, Jr., their exclusive agent to procure a purchaser or sell the land. Keith testified that Stinespring told him that the farm contained over six hundred acres and that before the deed was made to complainants, he, Keith, told Stinespring the terms upon which the land was sold; that it had been sold for \$30,000, based on six hundred acres at \$50 per acre. He testified explicitly that he told the purchasers there were six hundred acres in the farm listed to him by Stinespring. Complainants Caughron and Goins testified that they relied upon the statement that they were to get six hundred acres of land, and that they would not have bought the farm if they had known that it contained less than six hundred acres. Defendant Stinespring testified that after the sale had been made, Keith told him that he had sold the farm for \$30,000, and the terms upon which the sale was made. He and his wife thereupon executed the deed.

The county surveyor of McMinn county was employed by the complainants after their purchase of the farm to make a survey and calculation of acreage, which was done, and it was determined that the farm contained only 542.2 acres. The surveyor stated that it was impossible to follow the calls of the deed, because they were improperly given and many of them were short of the distance called for. He was asked as to each call and each line given in the deed, and it was found that practically all of the calls were incor-

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rectly given in the instrument. He testified that the lines were well established and the corners located.

From this testimony we are satisfied, and find as a fact, that the complainants purchased the Stinespring farm from the defendants through their regularly authorized agent at \$50 per acre, and paid therefor in money and notes the sum of \$30,000, upon the basis and the distinct understanding that the farm consisted of six hundred acres; that complainants relied upon this representation of acreage, and that they would not have given \$30,000 for the farm if they had not believed that it contained six hundred acres. The defendants were bound by the statement of their agent as to this representation of acreage. Complainants looked over the land prior to their purchase. While it is evident as a practical proposition that they could see the body of land they were to receive and form an estimate of its size and value, yet it is also apparent, that although the deficiency in acreage, being 57.7 acres, was sufficient in amount to be material in the contract, yet without an actual survey a purchaser could ordinarily be deceived as to the number of acres in so large a tract of land.

After the sale of the land the defendants moved to the State of Florida. At the time the bill in this case was filed defendant J. B. Stinespring was in McMinn county temporarily. One of the notes for purchase money had fallen due, and it was alleged in the bill that a certified check had been given to defendant Stinespring in part payment of this indebtedness, which

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payment had been made before they ascertained the shortage in acreage; that J. B. Stinespring had also taken the notes from the bank at Athens, and that he then had in his possession this note, upon which was then due \$2,188.88; that the note is payable to J. B. Stinespring or order, and there is nothing on the face thereof to put any purchaser of the same on notice as to any equity or right that the complainants might have therein in the way of a set-off or counterclaim for the shortage in acreage. They further averred that said defendant had no other property in Tennessee, and that he was fixing forthwith to leave McMinn county and go to his home in Florida and would not return, and was seeking to evade accounting to complainants for the shortage in said acreage, and unless restrained by proper fiat would do so, and thereby defeat the effort to obtain redress or relief against the defendants.

In addition to the prayer for ordinary process, complainants also prayed for an injunction to restrain J. B. Stinespring from disposing of said note or said cashier's check; that he be compelled and enjoined to deliver said note and cashier's check to the court, to be held subject to the orders of the court, and that attachment issue, attaching the note and cashier's check. There was also a prayer that a writ of *ne exeat republica* issue to stay defendant J. B. Stinespring from departing from or leaving the State without the express permission of the court, and they sought to have

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the said note credited with the sum of \$2,890 for the shortage in acreage.

Fiat was obtained and writs issued for the injunction, attachment and writ of *ne exeat* prayed for, and all said writs were executed on the defendant Stinespring, except the writ of attachment; the return of this writ being search made and the property described therein not found. Later, by agreement and entry of order in the cause upon the application of said Stinespring, he executed a bond in the sum of \$5,780, payable to the State for the use of complainants, conditioned that he should appear in person before the chancery court at Athens, Tennessee, and should abide by and perform the judgment of the court in this cause.

Complainants answered the bill, denying the material allegations therein. The chancellor upon final hearing dismissed the bill, and upon a motion for that purpose quashed and dismissed the writ of *ne exeat*. A reference was made to the master to report on the damages sustained by defendant for the wrongful issuance and execution of the writ of *ne exeat*. Complainants appealed upon the whole decree.

Where the sale is in gross the rule is that no compensation will be granted for a deficiency, unless such deficiency is so great as to justify a conclusion of fraud, or mistake equivalent to fraud. If a sale is by the acre and there is a deficiency, then the purchaser can recover for such deficiency at the agreed price per acre. For where the price is by the acre, if there is a misrepresentation made by the vendor and relied on

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by the vendee as to acreage, producing a loss, such misrepresentation, whether intended so or not, has all the essential elements of legal fraud or mistake. It is not absolutely essential in order to recover for a misrepresentation as to the quantity of land conveyed that the acreage should be stated in the deed, but this may be shown by extrinsic evidence. Likewise the amount of the consideration may be shown by parol testimony. The deed is only the execution of the contract, and the real contract and understanding between the parties in this respect will govern on the question. *Miller v. Bentley*, 5 Sneed, 671; *Seward v. Mitchell*, 1 Cold., 89; *Barnes v. Gregory*, 1 Head. 230; *Horn v. Denton*, 2 Sneed, 125; *Deakins v. Alley*, 9 Lea, 494; *Rich v. Scales*, 116 Tenn., 65, 91 S. W., 50.

The present case is one where there is a deficiency in acreage material in amount and affecting the contract; and, although the deed does not disclose the real contract as to the number of acres nor the price per acre, yet under the authorities it is clear this may be shown by extrinsic testimony. Where a matter of this kind must be presented by parol testimony alone, a safe rule to lay down would be that the proof should be clear and unmistakable, because matters arising outside the written instrument should be clearly proven.

However, in this case we find no difficulty in coming to the conclusion that there was a clear understanding between the agent and the purchasers that the price was to be \$50 per acre, and that the body of land contained six hundred acres. The grantors in

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their contract with the agent had represented the farm to contain six hundred acres, and in addition one of the grantors had stated to the agent that he thought it would run out more than that.

It was not apparent from the face of the deed that there was less than six hundred acres of the land, because some of the calls did not state the distance from one point to another in the lines. Moreover, it was found by the survey that there was a considerable deficiency in the calls for distance where the deed recited such distance from corner to corner.

We think therefore the chancellor was in error in dismissing the bill.

Under the record the writ of *ne exeat* was properly issued. The defendant was a nonresident of the State and was only within the jurisdiction of the court temporarily. He had no property in the State except the items of personal property which were on his person. He was about to remove with this personal property beyond the jurisdiction of the court. It was very essential to have the defendant in the custody of the court so that its orders and decrees might be made to operate upon him. The injunction in such case would have been insufficient.

The writ of *ne exeat* is not frequently issued, because the occasion for its demand seldom arises. Nevertheless, it is directly recognized in our statute (Shannon's Code, sec. 6246) providing that injunctions, attachments, writs of *ne exeat*, and other extraordinary process shall be granted by the chancellor, circuit

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judges, and judges of criminal and special courts. It is within the power and jurisdiction of the chancery court in a proper case to grant the writ. Gibson's Suits in Chancery, sec. 864; *Smith v. Koontz*, 4 Hayw., 189.

In *Smith v. Koontz*, the writ was issued in apprehension, based upon the character of the defendant and information that there was danger of the removal of the negro slaves who were the subject of the controversy.

The issuance of the writ in this case is not equivalent to imprisonment for debt, which is prohibited by our Constitution (article 1, sec. 18). In any case where it would amount to such imprisonment it would necessarily have to be denied. In this case the writ was not to compel the defendant to pay a debt, but in order to prevent him from removing personal property on his person or within his control from the jurisdiction of the court, without first giving bond, the property held by him being a certified check and a note payable by complainants upon which they were entitled to a credit of \$2,890. The note was negotiable, and if defendant were allowed to carry it beyond the jurisdiction of the court and deliver it to an innocent purchaser, the remedy of complainants would have been lost. It was not therefore to compel him to pay a debt that he was arrested, but to prevent his removing the check and note in question out of the jurisdiction of the court, or in place thereof, giving bond to the court. The purpose of the writ was to secure the jurisdiction of the court over the person of the defendant so that he might be

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prevented from carrying the property in question beyond the jurisdiction of the court, or be compelled by process of contempt to perform the decree of the court.

It has been held in this State that a statute (Shannon's Code, secs. 6092, 6093) giving the chancery court jurisdiction upon bill filed by the complainant to compel a judgment debtor to discover any specific property, prevent its transfer, and to subject it to the satisfaction of complainants' judgment, which can only be accomplished by process of attachment for contempt, is not imprisonment for debt. Judge McFarland said:

"The court may imprison him, not because he is unfortunately unable to pay his debts, but because he willfully refuses to obey the lawful orders of the court. In all other cases, when the court, in the exercise of rightful jurisdiction, orders specific things to be done, such as the execution of a deed, or the surrender of property by a trustee, etc., the order may be enforced by imprisonment, and such imprisonment is not imprisonment for debt." *Cresswell et al. v. Smith*, 8 Lea, 699.

This practice is not unlike the remedy we are now enforcing under the ancient writ of *ne exeat*. The reasoning why the enforcement of the one is not imprisonment for debt applies equally to the other.

The writ will not issue for demands which are uncertain or contingent. It will be applied to private rights with caution. Either the demand or its enforcement must be of an equitable nature. The intended departure beyond the jurisdiction of the court must be

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by positive allegations or by facts, threats, or declarations evidencing such intention, and that the right or demand sought will be lost or recovery greatly endangered by the defendant's departure. It is not essential to allege an intent to avoid jurisdiction. Gibson's Suits in Chancery, secs. 864-867, and notes; 29 Cyc., 383-393, and cases cited.

The chancellor was therefore in error in dismissing this writ upon the motion. Decree will be entered in this court reversing the decree of the chancellor and rendering judgment against defendants for the sum of \$2,890, as prayed for in the bill, which will be credited on the unpaid notes for purchase money, and in case this cannot be done, then this amount may be recovered against defendants and their sureties on the bond which the defendants executed in the case.

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BUD LONG v. STATE.

(*Knoxville*. September Term, 1915.)

JURY. Separation. Effect.

Notwithstanding accused consented to a separation of the jury, a conviction of felony by such jury cannot be upheld; Const., art. 1, sec. 9, providing that in all criminal cases accused shall be entitled to a speedy public trial by an impartial jury, precluding separation of the jury in criminal prosecutions for felony or where the death penalty may be assessed.

Cases cited and approved: *Dunn v. State*, 127 Tenn., 267; *Stone v. State*, 23 Tenn., 27; *Hines v. State*, 27 Tenn., 597; *Troxdale v. State*, 28 Tenn., 412; *Wesley v. State*, 30 Tenn., 502; *Wiley v. State*, 31 Tenn., 257; *Armstrong v. State*, 2 Okla. Cr., 567; *Preston v. State*, 115 Tenn., 343; *Hobbs v. State*, 121 Tenn., 413; *King v. State*, 87 Tenn., 304; *King v. State*, 91 Tenn., 617; *Sherman v. State*, 125 Tenn., 57.

Case cited and distinguished: *McLain v. State*, 18 Tenn., 240.

Codes cited and construed: Secs. 6462 (S. 1896).

Constitution cited and construed: Art. 1, secs. 6, 8, 9.

FROM ROANE.

Appeal from the Circuit Court of Roane County.—
S. C. BROWN, Judge.

J. W. STAPLES, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

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MR. JUSTICE BUCHANAN delivered the opinion of the Court.

Long was convicted of the crime of abduction and sentenced to serve a term in the penitentiary. Section 6462, Shannon's Code 1896. He has appealed to this court and assigned errors.

The several assignments of error are based on matters which we cannot consider, because a bill of exceptions was not seasonably filed. *Dunn v. State*, 127 Tenn. (19 Cates), 267, 154 S. W., 969. However, it appears on the technical record, to which our attention is called by the brief filed on his behalf, that the jury, upon his trial, after being impaneled and sworn, and after hearing a part of the evidence, was respited until the following morning, "and by agreement of the attorney general and the defendant and his counsel the jury was allowed to go without an officer." The only reasonable construction to be placed on what the record shows is that there was a total separation of the jury. It was allowed to dissolve into its component parts, and each unit composing it to mingle at will with his fellow citizens. On the following day the same jury, as the record shows, reassembled in court, and the hearing of the cause was resumed. It does not appear by whom the conduct above during the trial was suggested, whether by the defendant, his counsel, the attorney general, the court, or the jury; and no question was made on the verdict in the motion for new trial, nor is any account given by the record of the

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conduct of the units composing the jury during the time of the separation. Can such a verdict, and the judgment thereon based, be allowed to stand by this court? We answer, No. Manifestly the fair and impartial trial guaranteed to the defendant under the constitution was not given him. The constitution provides:

“That the right of trial by jury shall remain inviolate.” Article 1, sec. 6.

“That no man shall be . . . deprived of his life, liberty, or property but by the judgment of his peers or the law of the land.” Article 1, sec. 8.

“That in all criminal prosecutions, the accused hath the right to . . . a speedy public trial, by an impartial jury.” Article 1, sec. 9.

In an early and perhaps leading case on this question it was said:

“That the person accused may have the full benefit of a judgment by his peers, it is absolutely necessary that the minds of the jurors should not have prejudged his case, that no impression should be made to operate on them, except what is derived from the testimony given in court, and that they should continue impartial and unbiased.”

And it was pointed out in that case that one of the means necessary to securing a fair and impartial trial by a jury of the defendant's peers was not to permit the jury to separate from each other, or mingle with the balance of the community after it had been sworn. *McLain v. State*, 18 Tenn. (10 Yerg.), 240, 31 Am.

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Dec., 573. See, also, *Stone v. State*, 23 Tenn. (4 Humph.), 27; *Hines v. State*, 27 Tenn. (8 Humph.), 597; *Troxdale v. State*, 28 Tenn. (9 Humph.), 412.

After the decision of the foregoing cases a prisoner charged with a capital crime was put upon trial, and on the first day thereof eight jurors were impaneled and sworn, who, with the consent of the defendant and the attorney general, were by the court permitted to disperse until the next morning. On that day two other jurors were selected, and they, with the eight previously chosen, were permitted with like consent to disperse until Monday morning thereafter, on which day two other jurors were selected, and, the jury being thus complete, the trial proceeded regularly. The trial resulted in the defendant's conviction, and on his appeal to this court, after calling attention to the rule laid down in *McLain v. State*, supra, it was said:

“In the case before us the separation was permitted by the court, and consented to by the defendant, and therefore it is supposed the principles above do not apply. If the law requires the jury in a capital case to be kept together, the court cannot dispense with this requisition of law, nor ought the consent of the prisoner in a capital case to be taken. . . . The judge cannot lawfully dispense with the rule that the jury must be kept together, nor ought the consent of a prisoner in such case to be taken.”

It was also pointed out that, where the charge against the defendant was one calculated to excite the community against him, the rules of law for securing

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an impartial trial of the case should be firmly enforced. The judgment of the lower court was reversed, and the cause remanded. *Wesley v. State*, 30 Tenn. (11 Humph.), 502.

The above ruling was extended to a felony case where the punishment provided was not capital upon identical reasoning in *Wiley v. State*, 1 Swan (31 Tenn.), 257.

For general authority on the point here involved, see *Armstrong v. State*, 2 Okl. Cr. 567, 103 Pac., 658, 24 L. R. A. (N. S.), 776, and the case note thereon.

We find in our cases, in respect of the particular question here involved, no modification of the ruling made in *Wesley v. State* and in *Wiley v. State*, supra.

We think the reasoning of those cases is sound and should be adhered to. The rule established by them, as indicated in one of them, does not apply in cases of misdemeanor, but we think the rule in its full strictness should be applied in cases punishable by imprisonment in the penitentiary or by death; and, when it appears that a separation of the jury, such as is shown by the record in this case, has taken place during the trial of a cause, the conduct of the jury during the separation being wholly unexplained, the verdict is *ipso facto* vitiated, and no judgment based thereon should be allowed to stand.

It is suggested on the brief for the State that the consent of the defendant to the separation of the jury should work an affirmance of the judgment, and, as supporting that view, we are cited to *Preston v. State*,

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115 Tenn. (7 Cates), 343, 90 S. W., 856, 5 Ann. Cas., 722, and *Hobbs v. State*, 121 Tenn. (13 Cates), 413, 118 S. W., 262, 17 Ann. Cas., 177. But in the former of these cases the chief complaint was that the oath to the jurors had not been administered by the clerk in the formal way, and in the latter of these cases the point made was that the minute entry failed to show that the jury was sworn. We do not regard either of these cases as in point. In each of them the error complained of was one merely of procedure, and was properly held not to have vitiated the verdict. But in the present case the total separation of the jury, wholly unexplained, is an error of substance going to the very core of the right of the State to deprive the defendant of his liberty.

The present case is not to be taken as in conflict with those where a separation of the jury has occurred, but it appeared that the verdict of the jury was unaffected by the separation. *King v. State*, 87 Tenn. (3 Pick.), 304, 10 S. W., 509, 3 L. R. A., 210; *King v. State*, 91 Tenn. (7 Pick.), 617, 20 S. W., 169; *Sherman v. State*, 125 Tenn. (17 Cates), 54, 140 S. W., 209. No showing which can save the verdict appears in the transcript before us.

Reverse and remand.

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SPENCER LEE *v.* STATE.*(Knoxville. September Term, 1915.)*

1. CRIMINAL LAW. Trial. Custody of jury.

In a capital case, it is improper and constitutes reversible error to permit the jury to go at large pending the trial, even though accused consent; this depriving him of his constitutional guarantees of fair and impartial trial by jury. (*Post*, pp. 656, 657.)

Case cited and approved: Long v. State, 132 Tenn., 649.

2. RAPE. Evidence. Admissibility.

In a prosecution for rape, evidence of other acts of intercourse between the prosecutrix and other men is admissible, not only on the question of the prosecutrix's credibility, but on the probability of consent. (*Post*, pp. 657-662.)

Cases cited and approved: Rex v. Hodgson, 14 L. R. A. (N. S.), 714; Benstine v. State, 70 Tenn., 169; Titus v. State, 66 Tenn., 132; People v. Abbot, 19 Wend. (N. Y.), 192; People v. Jackson, 3 Park, Crim. Rep., 391; State v. Johnson, 28 Vt., 512; Brennan v. People, 7 Hun. (N. Y.), 171; People v. Benson, 6 Cal., 221; Watry v. Ferber, 18 Wis., 501; Ford v. Jones, 62 Barb. (N. Y.), 484; State v. Patterson, 88 Mo., 88; Reg. v. Cockroft, 11 Cox C. C., 410; Reg. v. Riley, 16 Cox C. C., 191; Rex v. Martin, 6 Car. & P., 562; McQuirk v. State, 84 Ala., 435; Rice v. State, 35 Fla., 236; Shirwin v. People, 69 Ill., 55; Bedgood v. State, 115 Ind., 275; State v. Cook, 65 Iowa, 560; State v. Jefferson, 28 N. C., 305; State v. Reed, 39 Vt., 417.

Case cited and distinguished: State v. Ogden, 39 Or., 195.

3. RAPE. Evidence. Admissibility.

In a prosecution for rape, evidence of prior intercourse between prosecutrix and accused is admissible to raise an implication of consent. (*Post*, pp. 657-662.)

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FROM BLOUNT.

Appeal from the Circuit Court of Blount County.—
S. C. BROWN, Judge.

McTEER & KRAMER, for appellant.

WM. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE FANCHER delivered the opinion of the
Court.

Spencer Lee was convicted of rape committed on the person of Mary Finger, a married woman. There are several assignments of error. We notice one incident on the trial which is not assigned as error, but, inasmuch as it is material to the case, we will look to it without an assignment.

An order in the record showing the process of the trial in the case recites that after the jury had been selected, impaneled and sworn, and having heard a part of the evidence, they were respited from further hearing until the meeting of the court the next morning, and, by consent of the attorney general, the defendant, and his counsel in open court, they were allowed to go without being put in charge of an officer. The record shows that the next morning the remaining evidence was introduced, and the case argued by counsel, where-

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upon the jury received their charge, and on the same day returned a verdict of guilty.

In the case of *Bud Long v. State*, 132 Tenn., 649, 179 S. W., 315, decided at the present term, we held that it was improper and constituted reversible error to permit the jury to go at large pending the trial of the case, on the ground that the defendant, under his constitutional guaranties of a fair and impartial trial by a jury, is entitled to have the jury removed from all possible contamination and influence, and that to permit the jury to depart and separate, and not to keep them under the charge of an officer, as is required by law, is such material innovation upon the rights of defendants to have this fair and impartial trial that the court will reverse the case for this alone. This was held, notwithstanding the fact that the defendant consented that the jury might separate. The reason for this ruling is stated in the opinion in that case, which is filed for publication, and will not be repeated in this opinion.

This case is also reversed for the same reason, and will be remanded to the lower court for a new trial.

There is an assignment of error with respect to the charge of the trial judge, which we deem it is proper to notice. The court charged the jury as follows:

“Further, gentlemen, should you believe that Mary Finger had had sexual intercourse with the defendant or with other men or boys before the time in question, the 22d of last July, you may look to said acts of lewdness, if shown in the proof, only for the purpose of

shedding light upon her credibility as a witness in this case.”

This instruction was not explained or qualified by any other portion of the charge. There was considerable evidence tending to show illicit acts with other men and boys, and also with the defendant previous to the act in question. The weight of this evidence should not have been limited to the effect upon the credibility and standing of the state's witness Mary Finger. Such proof is competent as bearing directly upon the principal question at issue, that is, whether the intercourse was by force or with the consent of the injured female, and this for the reason that no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.

The rule in many States is in accordance with the holding of the trial judge, and such is the rule also laid down by Greenleaf, vol. 3, sec. 214, and it is said that it was probably derived from the English cases of *Rex v. Hodgson*, and *Rex v. Aspinwald*. However, as pointed out in *Benstine v. State*, 2 Lea, 169, 31 Am. Rep., 593, and *Titus v. State*, 7 Baxt., 132, that rule was not adhered to in Tennessee.

There is a very interesting review of authorities on this subject in the note in 14 L. R. A. (N. S.), pp. 714 to 723. It appears that there is great diversity of opinion, but that the greater number follow the ruling in *Rex v. Hodgson*, supra. So, if the weight of author-

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ity is to be determined by the number of reported opinions, the greater weight must be said to be on that side.

It appears, however, that a respectable number of courts are with our own Tennessee court in their adherence to the contrary reasoning of Mr. Justice Cowan in *People v. Abbot*, 19 Wend. (N. Y.), 192. This learned judge contended that, inasmuch as the offense was always done in secret and commonly proved by the testimony of the prosecutrix alone, every fact ought to be received which tended to prove the absence on her part of the utmost reluctance and resistance to the connection. And, although the body of a harlot may, in law, no more be ravished than the person of a chaste woman, nevertheless it is true that the former is more likely than the latter voluntarily to have yielded.

Later the New York court, in *People v. Jackson*, 3 Park, Crim. Rep., 391, disapproved of the holding in *People v. Abbot*, on the ground that the weight of authority was against it, and that the remarks of Justice Cowan were *obiter dicta*. These views of that learned judge have been emphatically approved in other cases. Our own court, in *Titus v. State*, adopted his argument, and said: "We deem this reasoning unanswerable on the question." The Vermont court, in *State v. Johnson*, 28 Vt., 512, expressly approved the holding, as is done in *Brennan v. People*, 7 Hun (N. Y.), 171; *People v. Benson*, 6 Cal., 221, 65 Am. Dec., 506; *Watry v. Ferber*, 18 Wis., 501, 86 Am. Dec., 789; *Ford v. Jones*, 62 Barb. (N. Y.), 484.

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In *State v. Patterson*, 88 Mo., 88, 57 Am. Rep., 374, Sherwood, J., referred to Judge's Cowan's opinion as having been criticized, but frequently followed, and that the reasoning of that case he had not seen answered, nor did he believe it could be.

After all, where opinions are in conflict, it is not so much the duty of a court to follow the greater number of decisions as it is to adopt the sounder reasoning. The opposite view has been sustained by some because it had the larger number of adherents. The best, and in fact the only valid, reason for this adherence is expressed by the Oregon court in the case of *State v. Ogden*, 39 Or., 195, 65 Pac., 449, as follows:

“ . . . While a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, is expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify. . . .”

We admit that this affords some reason for that view. But does it outweigh the other reason in favor of such proof, that a defendant charged with this capital crime should have the benefit of all facts which may show the probability of consent on the part of the woman? If her character is good, it will indeed be hard to successfully impeach it, and as a rule the effort will not be made. Former acts of this nature with other men might not indicate so much a probability of consent with this man, but the fact, if true, as claimed, that she induced a relationship that began when he was a boy

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and continued on after she was married and up to the time of the alleged offense, would point most strongly in favor of her consent on this occasion. The rejection of the testimony for that purpose is very prejudicial.

Acts of sexual intercourse may always be proven between the prosecutrix and the defendant upon a trial for common-law rape prior to the alleged offense, for the purpose of raising an implication of consent. This has been held quite generally. *Reg. v. Cockroft*, 11 Cox C. C., 410; *Reg. v. Riley*, 16 Cox C. C., 191; *Rex v. Martin*, 6 Car & P., 562; *McQuirk v. State*, 84 Ala., 435, 4 South., 775, 5 Am. St. Rep., 381; *Rice v. State*, 35 Fla., 236, 17 South., 286, 48 Am. St. Rep., 245; *Shirwin v. People*, 69 Ill., 55; *Bedgood v. State*, 115 Ind., 275, 17 N. E., 621; *State v. Cook*, 65 Iowa, 560, 22 N. W., 675; *State v. Jefferson*, 28 N. C., 305; *State v. Reed*, 39 Vt., 417, 94 Am. Dec., 337.

It is here where the authorities divide. The sharp conflict in the decisions is over the competency of acts of intercourse between the prosecutrix and other men than the accused. There is a greater reason for the introduction where the proof is of acts between the direct parties, but all acts, conversations, and admissions of the woman tending to show that she is a prostitute, or of easy virtue, should be admitted for the twofold purpose of showing her character as affecting her testimony, and also to raise an implication of her consent.

The effect of the instruction of the trial judge to the jury on this subject was to reject, for the purpose of shedding light on the question of consent, not only

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acts with other men and boys, but the intimate relations testified to with the defendant.

The defendant in this case does not deny the act of carnal knowledge, but says that it was with her consent. This being the principal issue in the case, any previous acts upon her part testified to, if true, should be considered by the jury in coming to a conclusion as to whether she consented or not.

The court should have charged the jury that the evidence in question is proper and should be looked to, not only for the purpose of shedding light upon the credibility or standing of Mary Finger as a witness in the case, but also as an aid for the jury to determine whether the intercourse was by force or by her consent.

All the other assignments of error with respect to the admission of testimony and special requests to charge the jury are each and all overruled. We find no error on the part of the trial judge other than as set out in this opinion. We omit any other comment upon the testimony in the case, for the reason that it is to be again tried upon the facts.

Alexander v. Elkins et al.

R. M. ALEXANDER, JR., by next friend, R. M. ALEXANDER, SR., v. JAMES P. ELKINS, W. F. BARRETT and MAUDE ALEXANDER.

(*Knorville*. September Term, 1915.)

1. INJUNCTION. Criminal proceedings.

Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute exercising the State's police power in a matter as to which the legislature has complete jurisdiction, though it be charged that the statute is invalid, that a multiplicity of actions thereunder will injure and destroy civil and property rights of complainant, and that the damages resulting will be irreparable, when complainant's defense in a court having jurisdiction of the offense is adequate and unembarrassed. (*Post*, pp. 667, 668.)

Acts cited and construed: Acts 1909, ch. 207.

Case cited and distinguished: *Kelly v. Conner*, 122 Tenn., 339.

2. INJUNCTION. Criminal proceedings. Prosecutions under unconstitutional act.

Where the father of a girl threatened her husband, whom she had left, with interminable criminal prosecutions under a statute which the supreme court had declared unconstitutional, unless he contributed to her support, having procured a justice of the peace who was willing to issue warrants for such husband's arrest whenever demanded, such husband could restrain the father and justice from effecting such series of prosecutions, since the rule that courts of equity cannot enjoin threatened criminal proceedings under a statute enacted by the legislature in the exercise of its police power has no application to prosecutions threatened under acts adjudged unconstitutional by the supreme court, as a warrant of arrest, charging a party with a violation of such an act, is absolutely void, and if by collusion between an officer and a private citizen the latter is

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suffered to procure warrants of arrest and the purpose is expressed by such citizen to continue the procurement of false warrants if money demanded is not paid, and if the officer agrees to continue to issue them and to cause the defendant to be arrested on them until he comply with the demand to pay money, such defendant is not relieved of the illegal persecution by the facts that the warrants in fact and law charge no crime, and that he has an adequate defense as against them in any court of competent jurisdiction. (*Post*, pp. 668-672.)

Cases cited and approved: *Ulster Square Dealer v. Fowler*, 58 Misc. Rep., 325; *Poyer v. Des Plaines*, 123 Ill., 111; *Wallack v. Society for Reformation of Juvenile Delinquents in City of New York*, 67 N. Y., 23; *West v. New York*, 10 Paige (N. Y.), 539; *Crichton v. Dahmer*, 70 Miss., 602; *Littleton v. Burgess*, 14 Wyo., 173; *Hall v. Dunn*, 52 Or., 475; *Denton v. McDonald*, 104 Tex., 206; *Kelly v. Conner*, 122 Tenn., 339; *Old Dominion Telegraph Co. v. Powers*, 140 Ala., 220; *Thompson v. Tucker*, 15 Okl., 486; *Sullivan v. San Francisco Gas & Electric Co., et al.*, 148 Cal., 368; *N. O. Baseball & Amusement Co. v. City of New Orleans*, 118 La., 228; *Fritz v. Sims*, 122 Tenn., 137; *Fellows v. City of Charleston*, 62 W. Va., 665; *Mahoning, etc., Co. v. New Castle*, 233 Pa., 413.

3. PLEADING. Demurrer. Admission.

On demurrer the allegations of a bill must be taken as true. (*Post*, pp. 668-672.)

FROM BRADLEY.

↓ Appeal from the Chancery Court of Bradley County.
—V. C. ALLEN, Chancellor. ↓

JOHN C. RAMSEY, for appellant.

MAYFIELD & MAYFIELD, for appellees.

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MR. CHIEF JUSTICE NEIL delivered the opinion of the Court.

The bill alleges, in substance, that a short time prior to November 12, 1912, complainant and defendant Maude Alexander (formerly Elkins) intermarried; that they were both minors, and are still under age; that after living together a few months they separated, the wife returning to the home of her father, defendant James P. Elkins; that there was much controversy between the respective families as to which one was to blame, and in consequence great bitterness grew up; that soon after the separation the said defendant Elkins began a crusade against the complainant for the purpose of compelling him to support his wife; that with this view, on November 6, 1913, he procured a warrant and caused complainant to be arrested under the provisions of chapter 207, Acts 1909, one purpose of which was the compelling of husbands who had deserted and failed to provide for their wives to support them; that he was, under this warrant bound over, tried and convicted in the circuit court of Bradley county, and fined \$25, but the judgment was stayed, with a view to obtaining a reconciliation if possible, but no reconciliation has resulted; that he sought to have his wife return to him; that she refused to come back and live with him, yet, notwithstanding this, he sent her \$10 per month for five months; that on June 3, 1914, about two months after the payments ceased, defendant Elkins procured another warrant for complainant's arrest un-

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der the same act; that defendant Elkins is now threatening to have complainant arrested every week and that he will continue until he is arrested three hundred and sixty-five times, unless he continues to pay \$10 per month to his wife; that the defendant Barrett, a justice of the peace of Bradley county, has expressed his willingness to issue warrants for complainant's arrest whenever demanded by Elkins under the statute referred to; that in this manner complainant is being harassed and persecuted, and that such persecution will continue as threatened unless restrained by injunction; that is to say, that complainant will be continually arrested under warrants sworn out by Elkins and issued by Barrett, under the statute referred to, to compel him to pay the money demanded by Elkins for his daughter, complainant's wife; that complainant is thus wrongfully and maliciously persecuted, and required to give bond for his appearance at court, or be placed in jail, and that he is forced to incur great expense in making his defense and resisting the said unlawful encroachments on his rights as a citizen; that the only authority claimed for such arrests is the said chapter 207, Acts 1909, but that said supposed act is no true act, and is not a law of the State; that on the 16th of July, 1910, this supposed act was, by the supreme court, declared unconstitutional and void, a certified copy of the court's judgment in the case referred to (*State v. Thomas Miller*) being made an exhibit to the bill; that defendants Elkins and Barrett have been informed of the action of the supreme court on said

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chapter 207, Acts 1909, but have continued their persecution notwithstanding, and say they will still continue it, the defendant Barrett saying that he finds the act printed in his copy of the statutes for the year 1909, and that he will continue to issue warrants of arrest under it so long as it remains in his book; that the defendants Elkins and Barrett are thus defying the law as declared by the supreme court of the State, and through the existence of this unconstitutional, supposed act printed among the published Laws of 1909, they are directing the machinery of the law to purposes of gross injustice, with a view to compelling the complainant to pay the money demanded of him.

A demurrer was filed by the defendants offering, as a legal defense to the bill, that the complainant was "not entitled to enjoin defendants from prosecuting complainant for an alleged violation of the criminal laws of the State." This demurrer was sustained by the chancellor, and the bill dismissed.

The records of this court show that chapter 207, Acts 1909, was declared unconstitutional on July 16, 1910, on the ground that the act was in violation of section 17, art. 2, of our Constitution of 1870.

In the case of *Kelly v. Conner*, 122 Tenn., 339, 396, 123 S. W., 622, 25 L. R. A. (N. S.) 201, it was said:
/ . . . "Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a State in the exercise of the police power in relation to which the legislature has complete jurisdiction, although it be charged that the statute is in-

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valid, and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainants' defense thereto, in a court having jurisdiction of the offense, is adequate and unembarrassed; and we hold that the chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction, have any such power or jurisdiction, whatever may be the exceptions to the general rule in the courts of equity of other jurisdictions.")

/ We adhere to this statement of the law, but it does not apply to prosecutions threatened under acts which have already been adjudged unconstitutional by this court. In *Kelly v. Conner* that question was not in the mind of the court. There it was sought to enjoin threatened prosecutions under an act which had never been impeached. The bill charged that the act was unconstitutional, and sought to have it so declared. Ample reasons were given in the opinion of the court why such a course of litigation would be inadmissible under the facts presented in that case; but those reasons cannot be held to apply to a spurious prosecution under a supposititious act, already declared and adjudged by the highest judicial authority in the State, in a regular judicial proceeding, to be no true law. A warrant of arrest, charging a party with the violation of such an act, is just as void of efficacy on its face as if it charged a violation of the laws of China or Japan. But if by collusion between an officer of the law and a private citizen, the latter is suffered to procure war-

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rants of arrest, and the purpose is expressed on the part of such private citizen to continue the procurement of such false warrants until he has obtained hundreds of them, if money demanded be not paid, and if the officer of the law agrees to continue to issue them, and to cause the complainant to be arrested on them, until he comply with the unlawful demand to pay money, such citizen is not relieved of the persecution by the fact that the warrants in fact and law charge no crime. He can, it is true, be ultimately relieved when each case is finally brought before the higher courts, but under the allegations of the bill new prosecutions of the same false character will be brought, since, according to the bill, the threats of arrest are made notwithstanding knowledge of the decision of the supreme court declaring the act void. It will boot the complainant little that he is sure of overthrowing each new prosecution as it arises. He will suffer the harassment of the repeated interferences with his liberty, the constantly recurring trials, and the accumulating expenses. Under such circumstances the remedy at law is very inadequate. The whole persecution can be ended by the chancery court, through its injunctive power, at one stroke. Why should the court not exercise this power? It is urged that the chancery court has no jurisdiction to interfere with criminal prosecutions, except in the way of protecting property rights already under its care, and sought to be disturbed through the agency of a criminal prosecution by some party to the litigation, or connected with the interests

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in litigation, thus depriving the court, indirectly, of its control. Some other cases take a wider view of the power of the court to protect property rights against assaults through criminal prosecutions, but even on the stricter view, there can be, as we think, no objection to the bill before us. The chancery court is not asked to invade the jurisdiction of the criminal court. There is no question of guilt or innocence to be tried. Under the case stated there are no controversies to be settled by a criminal court. There is in this State no law under which the acts charged can be held criminal, and hence no crime is charged. None of the evils therefore stand in the way which are to be encountered when the court of chancery attempts to usurp the functions of courts of criminal jurisdiction. There is before us (accepting the bill as true, as must be done on demurrer) simply a bold misuse of criminal process, actual and threatened, to harass a man without any color of legality, and the expression of a purpose to continue this unlawful use indefinitely, through connivance of one of the law officers of the State, to compel complainant to pay money demanded. If there be no precedent for the interference of a court of chancery in such a case it is time one should be made. Certainly the relief sought falls within the general scope of those equitable principles which entitle a citizen to protection against multiplied, repeated, and vexatious suits.] Compare *Ulster Square Dealer v. Fowler*, 58 Misc. Rep., 325, 111 N. Y. Supp., 16.

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We have no knowledge of any direct authority on the precise point, unless it be *Block v. Crockett*, 61 W. Va., 421, 56 S. E., 826. The syllabus of that case correctly expresses its substance in the following language:

“Equity will not, as a general rule, interfere by injunction with criminal proceedings; but when a statute or municipal ordinance has once been declared illegal by a court of law of competent jurisdiction, and other prosecutions thereunder are begun or threatened which will result injuriously to one in the enjoyment of his civil rights of property in which he is protected by general law, equity will interfere by injunction to restrain the same.”

The court referred to in this excerpt was not a court of last resort, and therefore we do not wish to be understood as approving the ruling in that case in its entirety. In the case before us, as already stated, the act had been declared void by our court of last resort. In *Block v. Crockett*, other cases are referred to in support of the proposition stated in the syllabus; but, as we understand these cases, they merely suggest, or imply, without deciding the point, that equity would interfere by injunction, in case there had been, at law, a previous decision holding the statute void. These cases are *Poyer v. Des Plaines*, 123 Ill., 111, 13 N. E., 819, 5 Am. St. Rep., 494; *Wallack v. Society for Reformation of Juvenile Delinquents in City of New York*, 67 N. Y., 23; *West v. New York*, 10 Paige (N. Y.), 539.

The authorities on the general subject may be found collected in the cases, and the notes, to *Crighton v.*

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Dahmer, 70 Miss., 602, 13 South., 237, 21 L. R. A., 84, 35 Am. St. Rep., 666; *Littleton v. Burgess*, 14 Wyo., 173, 82 Pac., 864, 2 L. R. A. (N. S.), 631; *Hall v. Dunn*, 52 Or., 475, 97 Pac., 811, 25 L. R. A. (N. S.), 193; *Denton v. McDonald*, 104 Tex., 206, 135 S. W., 1148, 34 L. R. A. (N. S.), 453; also very many of these are in *Kelly v. Conner*, supra; also reported in 122 Tenn., 339, 123 S. W., 622, 25 L. R. A. (N. S.), 201; *Old Dominion Telegraph Co. v. Powers*, 140 Ala., 220, 37 South., 195, 1 Ann. Cas., 119, and note; *Thompson v. Tucker*, 15 Okl., 486, 83 Pac., 413, 6 Ann. Cas., 1012, and note; *Sullivan v. San Francisco Gas & Electric Co. et al.*, 148 Cal., 368, 83 Pac., 156, 3 L. R. A. (N. S.), 401, 7 Ann. Cas., 574; *New Orleans Baseball & Amusement Co. v. City of New Orleans*, 118 La., 228, 42 South., 784, 7 L. R. A. (N. S.), 1014, 118 Am. St. Rep., 366, 10 Ann. Cas., 757, and note; *Fritz v. Sims*, 122 Tenn., 137, 119 S. W., 63, 135 Am. St. Rep., 867, 19 Ann. Cas., 458, and note; *Fellows v. City of Charleston*, 62 W. Va., 665, 59 S. E., 623, 13 L. R. A. (N. S.), 737, 125 Am. St. Rep., 990, 13 Ann. Cas., 1185; *Mahoning, etc., Co. v. New Castle*, 233 Pa., 413, 82 Atl., 501, Ann. Cas., 1913B, 658.

[In the case before us, the court of civil appeals affirmed the chancellor's decree. This action, we think, was erroneous, and we accordingly direct a decree to be entered reversing the decree of the court of civil appeals, and that of the chancellor, and remanding the cause for further proceedings.]

Seay v. Georgia Life Ins. Co.

JOHN L. SEAY *v.* GEORGIA LIFE INSURANCE COMPANY.*(Knoxville. September Term, 1915.)***1. INSURANCE. Liability Insurance. Construction. "While acting under assured's instructions."**

Defendant insured plaintiff, a physician having in his employ two younger doctors as assistants, against loss from liability for bodily injuries or death suffered in consequence of error, mistake, or malpractice by any assistant in his employ "while acting under the assured's instructions." One of his assistants made a mistaken diagnosis, resulting in a judgment for damages against the physician. The diagnosis and treatment was left wholly to the assistant, and the physician apparently had no knowledge of the particular case and gave the patient no personal attention; the assistant merely acting according to previous general instructions and the custom which prevailed under the contract between himself and the physician. *Held*, that defendant was not liable, since the quoted words were intended to qualify defendant's liability, and if they were treated as covering the physician's general instructions, they would neither expand nor restrict the insurer's liability, but would be altogether meaningless. (*Post*, p. 675.)

2. INSURANCE. Construction of policy.

Though an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the insured, it should be construed, like other contracts, so as to give effect to the intention and express language of the parties. (*Post*, pp. 675-678.)

Cases cited and approved: *Travelers' Ins. Co. v. Myers*, 62 Ohio St., 529; *Ward v. Maryland Casualty Co.*, 71 N. H., 262; *Crouch v. Surety Co.*, 131 Tenn., 265.

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FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—W. B. GARVIN, Chancellor.

ALLISON, LYNCH & PHILLIPS, for appellant.

THOMPSON, WILLIAMS & THOMPSON, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

The complainant, Seay, is a physician, and was under contract to render necessary medical attention to several hundred employees of a mine of the Tennessee Coal, Iron & Railroad Company. He had in his employ two younger doctors as assistants.

A miner was hurt in an accident, and Dr. Seay's office was notified. One of the assistants responded to the call, undertook to diagnose the injuries, and proceeded to treat them. In so doing the assistant acted under general directions, within the scope of his employment, but Dr. Seay appears to have had no knowledge of this particular case, or at any rate he gave the patient no personal attention, not seeing him at this time. The diagnosis and treatment was left wholly to the assistant.

There seems to have been a mistaken diagnosis, and the treatment was consequently unsuccessful. Malpractice was alleged by the miner, who claimed to have

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suffered a permanent deformity by reason thereof, and suit was brought against Dr. Seay to hold him for damages arising from the conduct of his assistant and employee. There was a judgment against Seay for \$1,000.

The case before us is a suit by Seay on a physician's liability policy issued to him by defendant company; the suit being to recover the amount of the miner's judgment, which Seay has paid, and the costs and expenses of that litigation.

The defendant company answered, denying liability for several reasons, and from a decree in favor of the company, complainant has appealed.

The policy in question undertook to indemnify complainant, the assured—

“against loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death suffered by any person or persons in consequence of an alleged error or mistake or malpractice by any assistant in the employ of assured while acting under the assured's instructions and occurring while this policy is in force.”

The question determining liability is whether the assistant was “acting under the assured's instructions,” within the meaning of the policy.

It is conceded that Seay did not personally direct the assistant with reference to the treatment of the injured man, but complainant contends that the assistant acted “in the line of his employment and according to previous general instructions and the custom which prevailed under the contract between himself and Seay.”

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Complainant invokes the familiar rule that an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the assured, and maintains that the policy should be construed to cover acts performed under general directions or instructions of the assured, or, in other words, as protecting the assured against his assistant acting in the scope of the latter's employment.

We recognize the rule of construction relied on, but we must also bear in mind that "policies of insurance should be construed, like other contracts, so as to give effect to the intention and express language of the parties." 15 Cyc., 1037; *Travelers' Insurance Company v. Myers*, 62 Ohio St., 529, 57 N. E., 458, 49 L. R. A., 760; *Ward v. Maryland Casualty Co.*, 71 N. H., 262, 51 Atl., 900, 93 Am. St. Rep., 514.

These words "while acting under the assured's instructions," were certainly introduced to qualify the company's liability in some way, but, should we hold an assistant acting under general instructions or within the scope of his employment to be acting under the "assured's instructions," then the qualification attempted entirely fails. If we eliminate the words "while acting under the assured's instructions," we have left an undertaking to indemnify against malpractice, etc., "by any assistant in the employ of assured . . . occurring while this policy is in force." Thus deleted, the contract would mean exactly what complainant argues it now means. It would

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cover the malpractice of any assistant acting "in the employ," that is, under general directions of assured.

Interpreted as complainant insists the phrase under consideration would neither expand nor restrict the insurer's liability. It would add nothing to the contract, nor would it take anything out of the contract. It would be altogether meaningless.

We may not thus deny effect to the expressed language of the parties.

Moreover, as we have formerly had occasion to observe, all insurance is somewhat personal in its nature, resting to a great extent on the reputation and character of the assured. *Crouch v. Surety Company*, 131 Tenn., 265, 174 S. W., 1116.

In a physician's liability contract such as the one before us the learning, experience and ability of the individual insured necessarily and largely enter into the consideration. The risk assumed is the assistant "while acting under the assured's instructions." As a safeguard against the error, mistake, or malpractice of the assistant, the insurer stipulates for the instructions of the assured. The insurer, relying on the professional skill of the assured, contracts for his supervision, or at least for his instructions.

It cannot be held that the insurer by this sort of contract undertakes to answer for the mistakes or malpractice of a doctor's helper acting on his own responsibility without any advice or directions from the assured; such subordinate being unknown to the insurer, and the policy without provision as to his qualifica-

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tions. This would be an extraordinary hazard, and not one within the purview of this policy.

In the case at bar the assistant diagnosed and treated the patient without suggestion or aid from complainant. From a professional standpoint the assistant was acting independently. The insurer had no benefit of the supervising skill or instructions of complainant for which it had contracted. Such supervision or instructions might have averted the mistaken diagnosis and the consequent malpractice.

Without passing on other defenses, we are satisfied the assistant was not "acting under the insured's instructions," within the meaning of this policy, and the chancellor's decree will be affirmed, and the bill dismissed.

BUCHANAN and FANCHER, JJ., dissent.

Vaught v. V. & S. W. R. R.

G. C. VAUGHT v. VIRGINIA & SOUTHWESTERN RAILROAD.*

(Knoxville. September Term, 1915.)

DEATH. Federal employers' liability act. Limitation. New action.

Under the federal Employers' Liability Act (Act Cong. April 22, 1908, ch. 149, 35 Stat. 65 [U. S. Comp. St. 1913, secs. 8657-8665]), giving a right of action for the death of a railroad employee while engaged in interstate commerce, which may be brought in the State courts conditioned on suit being brought within two years from the day the cause of action accrued, the limitation of the remedy is necessarily a limitation of the right to sue at all, so that Shannon's Code, sec. 4446, providing that if an action is commenced within the time limited, and the judgment against plaintiff is rendered upon a ground not concluding his right of action, or the judgment for plaintiff is arrested or reversed, the plaintiff may commence a new action within one year, does not apply; and hence plaintiff, whose suit under the act, brought within two years, was terminated by a voluntary nonsuit, could not maintain a suit brought within one year from the termination of the former suit.

Case cited and approved: Harrisburg v. Rickards, 119 U. S., 199.

Cases cited and distinguished: Morrison v. B. & O. R. R., 40 App. D. C., 391; Gardner Lumber Co. v. Boomer *et al.*, 106 C. C. A., 168.

Code cited and construed: Sec. 4446 (S.).

FROM SULLIVAN.

Appeal from the Law Court of Sullivan County.—
DANA HARMON, Judge.

*On the constitutionality, application and effect of Federal Employers' Liability Act see notes in 47 L. R. A. (N. S.), 38, L. R. A., 1915C, 47.

Vaught v. V. & S. W. R. R.

A. H. BLANCHARD and LINDSAY, YOUNG & DONALDSON,
for appellant.

MR. JUSTICE FANCHER delivered the opinion of the
Court.

Suit was brought by the administrator of W. R. Campbell averring a cause of action under the federal Employers' Liability Act, for the wrongful killing of his intestate while in the service of the defendant. A demurrer to the declaration was sustained by the trial judge and by the court of civil appeals.

The second ground of demurrer is to the effect that the action is barred by the limitation of two years contained in the federal Employers' Liability Act. The plaintiff brought suit under this act within two years, but it was terminated by a voluntary nonsuit taken by the plaintiff with the permission of the court, and the present suit was brought within one year from the termination of the former suit.

Plaintiff therefore avers that he is entitled to maintain the action under section 4446, Shannon's Code, which is as follows:

“If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or his representatives and privies, as the case may be, may, from time to time,

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commence a new action within one year after the reversal or arrest.”

The right to sue under the Employers' Liability Act is conditioned on suit being brought within two years from the day the cause of action accrued. The liability and the remedy are created by the same statutes, and the limitation of that remedy is necessarily a limitation of the right. See *Harrisburg v. Rickards*, 119 U. S., 199, 7 Sup. Ct., 140, 30 L. Ed., 362.

While the question has not been directly disposed of so far as we know, upon reason it cannot be true that there must be different rules of limitation in the States, depending upon State statutes extending time or granting a saving of limitation. The conclusion is inevitable that the federal government did not intend for the limitation of this right to be changed or altered by the statute of any particular State.

The case of *Morrison v. B. & O. R. R.*, 40 App. D. C., 391, Ann. Cas., 1914C, 1026 (a District of Columbia case), construed the limitation of one year in the former Employers' Liability Act of June 11, 1906 (34 Stat. 232, ch. 3076). While, not an opinion of the highest federal court, it is well considered. It was averred that suit was delayed under an agreement with the defendant, which agreement was made for the fraudulent purpose of inducing delay until the expiration of the period of limitation, and that the agreement had been violated. The court said:

“The time within which the suit must be brought operates as a limitation of the liability itself as created,

and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right.”

The terms of limitation of the act of 1906 (which act was held invalid, except in the District of Columbia and territories of the United States) are the same as those in the present law, except the period of time has been extended from one to two years.

Upon this question, Thornton in his work on the Federal Employer's Liability and Safety Appliance Act (2 Ed.), sec. 114, pp. 173, 174, states the rule as follows:

“The action must be brought within two years after the death of the injured person, and the time is not extended by the pendency or dismissal of a former action, as allowed by some Codes in the ordinary cases. The statute requiring action to be brought within two years is not, strictly speaking, a statute of limitations, which must be specifically pleaded, but is an absolute bar, not removable by any of the ordinary exceptions of that statute.”

A similar proposition was passed upon by the federal circuit court of appeals (eighth circuit) in the case of *Tom J. Gardner Lumber Company v. Boomer et al.*, 106 C. C. A., 168, 183 Fed., 730. That was an action under the federal statute requiring bonds to be

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given by contractors doing government work for the benefit of furnishers of material, etc., being an act of Congress of February 24, 1905 (33 Stat. 811, ch. 778 [U. S. Comp. St. 1913, sec. 6923]), in which act a limitation was fixed of one year after the performance of final settlement of contract for the enforcement of the right given. Suit had been brought in the State court of Colorado, and dismissed, and was again brought in the federal court, after the lapse of one year. Plaintiff relied upon the Colorado statute, which permitted the commencement of a new action within one year after dismissal without trial upon the merits. It was insisted that the State statute should govern under section 721, Revised Statutes of the United States (U. S. Comp. St. 1913, sec. 1538), which provides that:

“The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

The federal court refused to adopt the application of the Colorado statute and used the following language:

“When the United States have enacted a statute of limitations as to a cause of action created by them, there is no room for the application of the statute of limitations prescribed by another sovereignty. It is only where the constitution, treaties, and statutes of the United States do not otherwise require or provide that the laws of the several States shall be regarded as

rules of decisions in trials at common law in the courts of the United States in cases where they apply.”

We think these authorities are sound. It was not the intention of Congress, upon enactment of this law to permit any variation of its terms by the legislatures of the States; but the intention is clear from the rules of law applying in such matters, as well as well as upon reason, that Congress, in taking over the control of this whole subject, intended that the limitation of two years was a condition upon the right to sue at all. The statute created a right of action which did not before exist. The condition to that right was that suit should be instituted within two years from the date the right of action accrued. While Congress gave the right to institute the action in the State courts, this does not change the rule so well settled in other actions of like character predicated upon federal statutes. The act broadened the forum within which suit might be instituted, and extended it to the State courts; but it is nevertheless a federal law. There is no provision in the federal act giving the right, upon voluntary nonsuit, to institute a new action after the expiration of the two years.

It results that we find no error in the judgment of the court and civil appeals, and it is affirmed.

State ex rel. v. Brown.

STATE *ex rel.* WEBB *v.* R. A. BROWN, County Judge *et al.*

(*Knoxville.* September Term, 1915.)

1. JUDGES. Compensation. Shall.

Where relator was serving as judge of the juvenile court under Priv. Laws 1913, ch. 277, creating the juvenile court, and providing that the judge thereof should serve without compensation, he was entitled to the salary prescribed by the Act of 1915, since by that act the legislature performed its mandatory duty to provide a salary for such judge, under Const. art. 6, sec. 7, providing that judges "shall" receive a compensation, and did not increase the salary in violation of that section. (*Post*, pp. 687-690.)

Acts cited and construed: Acts 1913, ch. 277.

Cases cited and approved: *The Judges' Salary Case*, 110 Tenn., 370; *Webb v. Carter*, 129 Tenn., 182; *Rucker v. Superior*, 7 W. Va., 661; *Purcell v. Parks*, 82 Ill., 346; *State v. McDowell*, 19 Neb., 442; *Louisville v. Wilson*, 99 Ky., 598.

Case cited and distinguished: *State ex rel. v. Burrow*, 119 Tenn., 376.

Constitution cited and construed: Const. art. 6, sec. 7.

2. COUNTIES. Juvenile court. Salary of judge. Payment by county.

The Act of 1915, providing a salary for the judge of the juvenile court of Knox county, does not violate the provision of Const. art. 2, sec. 29, that counties may be empowered to levy taxes for county purposes only, since the juvenile court is a county forum, serving a county purpose. (*Post*, p. 690.)

Constitution cited and construed: Const. art. 2, sec. 29.

FROM KNOX.

State ex rel. v. Brown.

Appeal from the Chancery Court of Knox County.—
W. D. WRIGHT, Chancellor.

JOHNSON & Cox, for appellant.

JNO. W. GREEN, HUGH M. TATE and MAYNARD & LEE,
for appellee.

MR. JUSTICE WILLIAMS delivered the opinion of the
Court.

This is a suit on relation of D. C. Webb, judge of the juvenile court of Knox county, seeking to compel, by mandamus, defendants Brown, the county judge, and the county of Knox to pay to relator the salary for the month of June, 1915, alleged to be payable to him, as such officer, according to law. The case was heard on bill of complaint and demurrer; the chancellor overruling the demurrer of the defendants.

The juvenile court was created by Acts (Private) 1913, ch. 277, the relator having been appointed to serve as the first occupant of the office of judge of that court.

At the next general election, in August, 1914, he was elected to that position by the qualified voters. At that time there was no provision made by statute for his compensation. On the contrary the act of 1913 provided that the judge of the juvenile court should serve without compensation.

The general assembly at its 1915 session passed an act which prescribed that a salary of \$100 per month be paid said judge, and it was to procure the payment of that salary that the action was brought.

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The grounds of the defendants' demurrer is indicated by what it said below.

The first contention of the appellants for a reversal is that, since at the date of appellee's election and qualification the provision of the law was that the judge of that court should serve without compensation, it was not within the power of the legislature to increase the compensation during the appellee's term of office, under the constitution.

The section of the constitution invoked by appellants (article 6, sec. 7) is as follows:

"The judges of the supreme or inferior courts, shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected. They shall not be allowed any fees or perquisites of office or hold any office of trust or profit under this State or the United States."

The words providing for compensation differ from those used in clauses in relation to the same subject-matter in the constitutions of some of the other States. The provision is not that the judges shall receive such compensation for their services as the legislature may determine, but that they shall receive a compensation, the subsidiary provisions being that the same should be by way of salary to be ascertained or fixed by the legislature. To make more certain the form that the compensation should take, it was provided that the same should not be from fees or perquisites.

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The thought uppermost in the minds of the members of the constitutional convention was to set apart the judges and to give to them independence in the discharge of their high duties. They were not to be dependent on the will or whim of the politicians or the lawmaking power in respect of a reward by way of an increase, or of punishment by way of a diminution of their compensation during their tenure of office; they were not to be dependent on fees to be paid by a party litigant. Deprived of holding any other office of trust under the State or Nation, they were to be compensated for judicial service by those they serve—the people. “It is said by Mr. Story, quoting from the *Federalist*, that, next to permanency in office, nothing could contribute more to the independence of the judges than a fixed appropriation for their support.” *The Judges’ Salary Case*, 110 Tenn., 370, 389, 75 S. W., 1061, citing Story on the Constitution, sec. 1629.

It cannot be conceived that it was purposed by the language thus used to leave it within the power of the legislature to prescribe that the regular or tenure judges of the State should serve without compensation since in such case the natural tendency would be towards the result that only men of means could afford to occupy places on the bench.

Speaking of the expression of the sovereign will in the fundamental law, it was said in *State ex rel. v. Burrow*, 119 Tenn., 376, 104 S. W., 526, 14 Ann. Cas., 809:

“The provisions of these solemn instruments are not advisory, or mere suggestions of what would be

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fit and proper, but commands which must be obeyed. Presumably they are all mandatory. Certainly no provision will be construed otherwise, unless the intention that it shall be unmistakably and conclusively appears upon its face'' (citing Cooley, Const., Lim., 93).

Seldom, if ever, may the word "shall," as here used, be treated otherwise than as evidencing a mandate. Cooley, Const. Lim., 93; *Webb v. Carter*, 129 Tenn., 182, 239, 165 S. W., 426.

If this be true, the legislature in the act creating the office of judge of the juvenile court should have complied with the mandate, and provided a compensation for the occupant of the office of judge; how much should be allowed was within its discretion, provided it was some amount. Failing in that duty, the legislature later performed it when the amendatory act was passed and a salary was thereby fixed. The compensation by way of salary was then created, not increased. There can be no increase of a quantity that has no existence.

The constitutional provision forbidding an increase or reduction of the compensation during the time for which Judge Webb was elected does not have application.

In Mechem, Public Officers, sec. 858, it is said:

"Where, however, the salary or compensation has not been fixed at all at the time of the election or appointment, this provision does not prevent its being fixed after the term begins." *Rucker v. Supervisor*, 7 W. Va., 661; *Purcell v. Parks*, 82 Ill., 346; *State v.*

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McDowell, 19 Neb., 442, 27 N. W., 433; *Louisville v. Wilson*, 99 Ky., 598, 36 S. W., 944.

The remaining contention of the defendant is that the legislature exceeded its power when it prescribed in the amendatory act that the salary of the judge of the juvenile court should be paid by Knox county, the claim being that that official is a State officer, and can be paid for his services alone out of State funds, and that the contrary provision of the amendatory act violates article 2, sec. 29, of the constitution, which relates to the legislature empowering counties to levy taxes for county purposes only.

Without going here into a detailed analysis of the act, we hold that, though a court of record, the juvenile court so created is a county forum, and serves a county purpose. It provides for supervision of the homeless, dependent and delinquent children, the vagrants, beggars, waifs, truants, and incorrigibles of Knox county.

It has been held that the probate court of a county (Shelby), though a court of record, is a county court, created for well-recognized county purposes, the presiding judge of which may be paid for his services out of the county treasurer. *Judges' Salary Cases*, *supra*. For stronger reasons, the act here under review validly provided for the compensation of the complainant out of county funds.

Finding no error in the decree of the chancellor, it is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1915.

J. H. SULLIVAN, RECEIVER, *v.* C. F. FARNSWORTH.

(Jackson. April Term, 1915.)

1. CORPORATIONS. Stockholders. Liability. Subscription.

Where defendant did not formally subscribe for stock in a corporation, but merely receipted for, accepted, and held the certificates, he was nevertheless liable for the unpaid balance of the stock. (*Post*, pp. 696-698.)

Cases cited and approved: *Upton v. Tribilcock*, 95 U. S., 45; *Chubb v. Upton*, 95 U. S., 665; *Sanger v. Upton*, 91 U. S., 56; *Jackson v. Traer*, 64 Iowa, 469; *Calumet Paper Co. v. Stotts*, 96 Iowa, 147; *Clevenger v. Moore*, 71 N. J. Law, 148; *Dunn v. Howe* (C. C.), 96 Fed., 160; *Barron v. Burrill*, 86 Me., 66; *Id.*, 86 Me., 72; *Shickle v. Watts*, 94 Mo., 410.

2. PLEADING. Objections. Cure. Pleading of adverse party. Statutes of other states.

Although it is necessary to plead and prove the statutes of a foreign State in order to recover under them, plaintiff is relieved from doing so, if defendant pleads them and agrees that

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they control, since the defendant is thereby estopped from controverting them. (*Post*, pp. 699, 700.)

Cases cited and approved: *N. & C. R. Co. v. Sprayberry*, 56 Tenn., 852; *Railroad v. Foster*, 78 Tenn., 351; *Railway Co. v. Lewis*, 89 Tenn., 235; *Kelley Bros. v. Fletcher*, 94 Tenn., 1; *Harris v. Water & Lt. Co.*, 114 Tenn., 328; *Mandel v. Swan, etc., Co.*, 154 Ill., 177; *Ball v. Anderson*, 196 Pa., 86; *Rice v. Merrimack Hosiery Co.*, 56 N. H., 114; *Salt Lake, etc., Bank v. Hendrickson*, 40 N. J. Law, 52; *Nashua, etc., Bank v. Anglo-Amer., etc., Co.*, 189 U. S., 221.

3. CORPORATIONS. Stockholders. Holding without subscription.

Where statutes provide for recovery of the unpaid balance on stock only in case of "subscription to or agreement for" the stock, the actual taking of the shares will support the action; on express agreement being necessary. (*Post*, pp. 700, 701.)

Case cited and distinguished: *Barron v. Burrill*, 86 Me., 72.

4. PLEADING. Requisites. Formal words. Fraud.

Rev. St. Me. 1903, ch. 47, sec. 50, provides that stock may be issued in payment for services, and, in the absence of fraud, the judgment of the directors shall be conclusive as to the value of such services. *Held*, that a bill charging the issuance of stock to defendant to be without consideration sufficiently impeaches the consideration as fraudulent, although the word "fraud" is not used. (*Post*, pp. 701, 702.)

5. CORPORATIONS. Liability of stockholders. Jurisdiction. Laws of other states. Comity.

Although, under the general rule that stockholders may be compelled to pay up their stock in full for the benefit of creditors, in Tennessee it must appear that other assets, when collected, are insufficient, and all holders of stock not fully paid up must be made parties, so as to apportion the loss equitably among them, nevertheless, where the stock is that of a foreign corporation, the relation of the holder being contractual and entered into in contemplation of the laws of the State of incorporation, those laws govern, and the courts of Tennessee will

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enforce the remedy they provide against a single stockholder, in so far as that remedy is not penal. (*Post*, pp. 703-707.)

Cases cited and approved: *Sweeney v. Railroad*, 118 Tenn., 297; *Jones v. Whitworth*, 94 Tenn., 602; *Shields v. Clifton Land Co.*, 94 Tenn., 123; *Cartwright v. Dickinson*, 88 Tenn., 476; *Railroad v. Parks*, 86 Tenn., 560; *Morrow v. Iron & Steel Co.*, 87 Tenn., 265; *Chase v. Railroad Co.*, 5 Lea, 415; *Kelley v. Fletcher*, 94 Tenn., 1; *Upton v. Tribilcock*, 91 U. S., 47; *Washburn v. Green*, 123 U. S., 30; *Appleton v. Turnbull*, 84 Me., 72; *Trust Co. v. Loan Co.*, 92 Me., 448; *Simmons v. Taylor*, 106 Tenn., 740; *Adler v. Mil. Pat. Brick Mfg. Co.*, 13 Wis., 57; *Patterson v. Lynde*, 112 Ill., 196; *Vick v. Lane*, 56 Miss., 681; *Pierce v. Construction Co.*, 38 Wis., 258; *Hadley v. Russell*, 40 N. H., 109; *Erickson v. Nesmith*, 46 N. H., 371; *Umsted v. Buskirk*, 17 Ohio St., 114; *Van Pelt v. Gardner*, 54 Neb., 701; *Clarke v. Cold Springs Opera House Co.*, 58 Minn., 16; *Dunston v. Hoptonic Co.*, 83 Mich., 372; *Woods v. Wicks*, 75 Tenn., 40; *Whitman v. National Bank*, 176 U. S., 559.

6. CORPORATIONS. Organization. Powers. Other states.

Rev. St. Me. 1903, ch. 47, sec. 6, providing for the incorporation of companies to carry passengers and freight in other States, and that "In all such cases the articles of agreement and certificate of organization shall state that such business is to be carried on only in States and jurisdictions when and where permissible under the laws thereof" is not void as attempting to create a corporation in one State in which it is prohibited to operate, but is merely restrictive of the right of such corporation to do business, limiting it to the States whose laws also permit its operation. (*Post*, p. 707.)

Code cited and construed: Code 1903, ch. 47, sec. 6.

7. CORPORATIONS. Stockholders. Liability. Interest.

The holder of corporate stock is liable for the unpaid balance thereon from the time he receives the stock; and hence the receiver, suing to recover such balance, may recover interest from the date of subscription, although he is not liable for interest where such principal liability is penal. (*Post*, pp. 707, 708.)

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FROM SHELBY.

Appeal from the Chancery Court of Shelby County.
—FRANCIS FENTRESS, Chancellor.

METCALF & METCALF, for appellant.

CARUTHERS EWING, for appellee.

MR. JUSTICE FANCHER delivered the opinion of the Court.

Complainant is receiver of the Lake View Traction Company, a Maine corporation. This concern undertook to construct an interurban railway running out from Memphis to a point in northern Mississippi, and became insolvent.

The defendant was induced by his friend, the late W. A. Percy, of Memphis, to take stock in the concern. He first on July 31, 1906, put up \$1,000 on the assurance of Percy, acting for the traction company, that this was the full extent of his liability. Later, on May 9, 1907, \$1,000 of additional stock was issued in his name, and finally, on February 24, 1910, under a representation that it was necessary in order to successfully carry out the enterprise, he agreed to and did pay in \$5,000. Preferred stock issued to defendant to the par value of \$7,000. The second \$1,000 was not paid for, and the sum of \$6,000 was the total amount of money paid by defendant. He is not contradicted

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in his statement that he did not make these payments as an investment, but in order to assist his lawyer and friend, W. A. Percy.

Defendant also received as a bonus additional common stock to the par value of \$4,500, and it is inferred that the second \$1,000 of preferred stock was not intended to be paid for. Percy assured Farnsworth that the money he had paid would be his total liability, and Farnsworth did not inspect the certificates, and did not know that he had received any other than the \$6,000 of stock for which he had paid. He did not know whether this stock was common or preferred. The record of the corporation shows his receipt, however, for the full amount issued to him, and he retained all this stock until this suit was brought, June 10, 1913.

The company, in all its sales of preferred stock, issued an additional fifty per cent. of common stock as a bonus. Its entire capital, when organized, March 17, 1906, was \$50,000, but this was increased by amendment of its charter to \$1,000,000; the stock being divided equally, common and preferred. Its charter was filed in Tennessee with the secretary of State.

In addition to a bonded debt of \$350,000, there was established and judicially determined unpaid unsecured debts of \$119,000, at the time the present suit was brought. Under a general creditors' bill its entire assets were administered and exhausted in payment on certain secured debts, leaving all unsecured debts unpaid.

Thereupon the receiver was ordered to institute such action or actions as may be necessary to recover on account of unpaid stock subscriptions as may be due, for the common benefit of all who may be creditors in the receivership cause, and entitled to have said assets collected.

The present suit is brought to collect of defendant on behalf of the unsecured creditors the \$5,500, being the amount of the face value of the capital stock of the traction company, issued to defendant for which it is conceded he did not pay anything, either in money or services.

The chancellor rendered a decree against defendant for \$5,500, with interest from June 24, 1910, date of the last delivery of stock to defendant.

The defendant has appealed, and upon his assignment of errors presents a number of propositions to determine.

It was not necessary to make defendant liable to the responsibilities of a stockholder that he should have formally subscribed for stock. The fact that he receipted for, accepted, and held the certificates, rendered him amenable to all the responsibilities attaching in favor of unsecured creditors. *Upton v. Tribilcock*, 95 U. S., 45, 47, 23 L. Ed., 203; *Chubb v. Upton*, 95 U. S., 665, 24 L. Ed., 523; *Sanger v. Upton*, 91 U. S., 56, 23 L. Ed., 220; Thompson's Liability of Stockholders, sec. 105; *Jackson v. Traer*, 64 Iowa, 469, 20 N. W., 764, 52 Am. Rep., 456; *Calumet Paper Co. v. Stotts*, 96 Iowa, 147, 64 N. W., 782, 59 Am. Rep., 362;

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Clevenger v. Moore, 71 N. J. Law, 148, 58 Atl., 88; *Dunn v. Howe* (C. C.), 96 Fed., 160; *Barron v. Burrill*, 86 Me., 66, 29 Atl., 939; *Id.*, 86 Me., 72, 29 Atl., 938 (two cases); Cook on Corporations, p. 251, sec. 52; *Shickle v. Watts*, 94 Mo., 410, 7 S. W., 274.

The two cases of *Barron v. Burrill* are especially appropriate to this question. It would be highly dangerous to absolve a stockholder from liability because it appeared from his own statements that he did not remember or did not know that he had receipted for and held bonus stock in a corporation. Very many might escape the liability if this were so.

What are the laws of Maine upon the subject? We quote from the Code of Maine, 1903, as follows:

Chapter 47, sec. 50:

“Any corporation may . . . issue stock for services rendered to such corporation and the stock so issued shall be full paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the . . . services rendered, shall be conclusive.”

Chapter 47, sec. 87:

“The capital stock subscribed for any corporation is declared to be and stands for the security of all creditors thereof; and no payment upon any subscription to or agreement for the capital stock of any corporation, shall be deemed a payment within the purview of this chapter, unless *bona fide* made in cash, or in some

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other matter or thing at a *bona fide* and fair valuation thereof.”

Chapter 47, sec. 89:

“Any person having such judgment [i. e., on claims enumerated in section 88], or any such trustees, receivers or other persons appointed to close up the affairs of an insolvent corporation, may, within two years after their right of action herein given accrues, commence an action on the case or bill in equity, without demand or other previous formalities, against any persons, if a bill in equity, jointly or severally, otherwise severally, who have subscribed for or agreed to take stock in said corporation and have not paid for the same; . . . and in such action they may recover the amount of the capital stock so remaining unpaid or withdrawn, not exceeding the amounts of said judgments or the deficiency of the assets of such insolvent corporation. But no stockholder is liable for the debts of the corporation not contracted during his ownership of such unpaid stock, nor for any mortgage debt of said corporation; and no action for the recovery of the amounts hereinbefore mentioned shall be maintained against a stockholder unless proceedings to obtain judgment against the corporation are commenced during the ownership of such stock, or within one year after its transfer by such stockholder is recorded on the corporation books.”

It is said that the laws of Maine were not properly pleaded.

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It is necessary to allege and prove the statutes of another State in order to pursue a remedy afforded or enforce a liability existing under such laws. *N. & C. R. Co. v. Sprayberry*, 9 Heisk., 852; *Railroad v. Foster*, 10 Lea, 351; *Railway Co. v. Lewis*, 89 Tenn., 235, 14 S. W., 603; *Kelley Bros. v. Fletcher*, 94 Tenn., 1, 28 S. W., 1099; *Harris v. Water & Light Co.*, 114 Tenn., 328, 348, 85 S. W., 897; *Mandel v. Swan, etc., Co.*, 154 Ill., 177, 40 N. E., 462, 27 L. R. A., 313, 45 Am. St. Rep., 124; *Ball v. Anderson*, 196 Pa., 86, 46 Atl., 366, 79 Am. St. Rep., 693; *Rice v. Merrimack Hosiery Co.*, 56 N. H., 114; *Salt Lake, etc., Bank v. Hendrickson*, 40 N. J. Law, 52; *Nashua, etc., Bank v. Anglo-Amer. etc., Co.*, 189 U. S., 221, 23 Sup. Ct., 517, 47 L. Ed., 782.

We think, however, the complainant was excused in this case from setting up the statutes and laws of Maine:

(a) Because the answer of defendant pleads those laws, averring:

“The defendant claims that the rights of the parties are to be determined by the laws of Maine, which, without further proof, may be taken and treated as shown in the public statutes, and decisions of the supreme court of Maine.”

(b) Because the agreed stipulation of proofs made by the parties filed as exhibit a copy of the Revised Statutes of the State of Maine in relation to unpaid stock subscriptions. The only qualification to the agreement was that:

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“Defendant did not know the Maine laws and denies their materiality.”

There is no exception by defendant to the introduction of the laws on the ground that they were not pleaded.

Defendant did not set forth the statutes of Maine in his answer, but insisted they were controlling, and agreed that they may be taken and treated as shown in the public statutes and decisions of the supreme court of Maine. He will not be allowed on appeal to take a position so contrary to his pleading and proposed agreement made of record.

The insistence is, further, that the action cannot be maintained, except under the statutes of Maine, and these laws only provide a remedy in case of “subscription to or agreement for the capital stock.” In *Barron v. Burrill*, 86 Me., 72, 29 Atl., 938, involving the question, the court said:

“An actual taking of shares is equivalent to subscriptions or an agreement to take. Either comes within the meaning of the statute.”

That was a rational and practical construction of the statute. Defendant received and receipted for the shares sued on, and he should not be heard to say that he did not know or remember of the transaction.

Another proposition presented is that the stock was issued to defendant as a result of the action of the board of directors on account of what they thought was or would be valuable services rendered by the de-

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fendant, and no proper pleading impeached that action.

The Maine Code (Rev. St. 1903, ch. 47, sec. 50), hereinbefore set out, authorizes the corporation to "issue stock for services rendered to the corporation, and the stock so issued shall be fully paid stock and not liable to any future call or payment thereon," and that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the services shall be conclusive."

The bill charged in effect that for the stock here in question Farnsworth rendered no service to the company which was a valuable consideration, thereby impeaching the pretended consideration of services rendered.

The proof showed that on April 19, 1906, a resolution was passed by the board of directors providing:

"That the president and secretary be directed to issue every subscriber of one share of preferred stock a like amount of common stock upon the payment in full of the preferred stock."

It also appeared that \$1,000 of the common stock was issued to defendant after a resolution had been passed providing for the issuance to certain named individuals, including defendant, each \$1,000, "in consideration of the services rendered by the several parties hereinafter named during the past year."

It is argued that inasmuch as it appears that Mr. Farnsworth was a man of wealth and prominence in Memphis, and that other men of high standing sub-

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scribed for stock subsequent to the time Mr. Farnsworth did, it is clear that the company considered the connection of Mr. Farnsworth with the company and his investment therein as the rendition of such services as would justify the company in issuing to him the common stock, Mr. Farnsworth testified that he did not render any services and paid nothing for the stock, except \$6,000 for the \$6,000 preferred stock. So on his own statement nothing was paid in money or services for \$1,000 of preferred stock and \$4,500 of common stock issued to him. But his learned counsel says for him that, though he rendered no service considered valuable by him, the common stock was issued in the belief of the officials of the company that he had rendered valuable services, and that their judgment under the Maine act cannot be impeached, except under proper averment and proof to impute actual fraud.

The issuance of common stock was to all purchasers of preferred stock, and cannot be considered as in contemplation of services rendered. In reality it was issued purely as a bonus, as was also the issuance of the \$1,000 of preferred stock issued to defendant, for which he paid nothing. The issuance of the stock for pretended services was sufficiently attacked as a fraud, for while it is not so denominated in the bill in exact words, yet the issuance of all this stock is attacked, and it is distinctly averred that no consideration was paid for it. This is a sufficient attack within the Maine statute.

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The remedy of the creditor to finally look to stockholders who have not paid in full for their stock after the other assets have proven inadequate is applied by the American courts generally. The capital stock, especially unpaid subscriptions, constitute, in equity, a trust fund for the benefit of creditors, and the stockholders may be compelled to make payment upon his stock to its par, if so much is necessary to pay debts. Shannon's Code, sec. 2058; *Sweeney v. Railroad*, 118 Tenn., 297, 314, 100 S. W., 732; *Jones v. Whitworth*, 94 Tenn., 602, 30 S. W., 736; *Shields v. Clifton Land Co.*, 94 Tenn., 123, 28 S. W., 668, 26 L. R. A., 509, 45 Am. St. Rep., 700; *Cartwright v. Dickinson*, 88 Tenn., 476, 12 S. W., 1030, 7 L. R. A., 706, 17 Am. St. Rep., 910; *Railroad v. Parks*, 86 Tenn., 560, 8 S. W., 842; *Morrow v. Iron & Steel Co.*, 87 Tenn., 265, 10 S. W., 495, 3 L. R. A., 37, 10 Am. St. Rep., 658; *Chase v. Railroad Co.*, 5 Lea, 415; *Kelley v. Fletcher*, 94 Tenn., 1, 28 S. W., 1099; *Upton v. Tribilcock*, 91 U. S., 47, 23 L. Ed., 203; *Washburn v. Green*, 123 U. S., 30, 10 Sup. Ct., 280, 33 L. Ed., 516; *Appleton v. Turnbull*, 84 Me., 72, 24 Atl., 592; *Trust Co. v. Loan Co.*, 92 Me., 448, 43 Atl., 24; Cook on Corporations, sec. 199; Beach, Private Corporations, secs. 113, 116; Thompson, Liability of Stockholders, secs. 10, 11.

In Tennessee it should appear that the other assets have been or are being collected, and are insufficient to pay debts, and an account must be taken, and an order made in the nature of a call upon stockholders for unpaid subscriptions, and this must be made ratably, so

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as to be equal and uniform. *Simmons v. Taylor*, 106 Tenn., 740, 63 S. W., 1123.

And it is held in several jurisdictions, in accord with the Tennessee rule, that equality and complete justice should be meted out, and to this end all the solvent stockholders within the jurisdiction should be joined, at least where it is practicable to do so. *Adler v. Mil. Pat. Brick Mfg. Co.*, 13 Wis., 57; *Patterson v. Lynde*, 112 Ill., 196, 205; *Vick v. Lane*, 56 Miss., 681; *Pierce v. Construction Co.*, 38 Wis., 258; *Hadley v. Russell*, 40 N. H., 109; *Erickson v. Nesmith*, 46 N. H., 371; *Umsted v. Buskirk*, 17 Ohio St., 114; *Van Pelt v. Gardner*, 54 Neb., 701, 75 N. W., 874; *Clarke v. Cold Springs Opera House Co.*, 58 Minn., 16, 59 N. W., 632; *Dunston v. Hoptonic Co.*, 83 Mich., 372, 47 N. W., 322; Thompson on Stocks & Stockholders, art. 447.

The practice of bringing the various parties interested before the court in order to properly apportion the liability of each delinquent stockholder is the better practice in our opinion. But, under the Maine statute, each separate stockholder may be sued. The objection made by defendant is that the bringing of only one stockholder before the court, which this method permitted under the laws of Maine, is special and exclusive to that State, and will not be enforced in Tennessee, because it is not in harmony with our laws. He cites Heliwell on Stocks and Stockholders and opinions of a number of courts.

Many cases cited are upon statutes creating an additional personal liability to the extent of the par value

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of the stock to pay creditors, such, notably, as the national banking laws. These statutes impose an added liability of the stockholder, and such liability is a creature of the statute and somewhat penal in its nature. *Woods v. Wicks*, 7 Lea, 40. We will not confuse authorities applying to those statutes with the right, based upon public policy, of creditors to require that corporations with which they deal shall hold, as the equivalent of all stock issued, full value in money, property, or valuable services, and that bonus stock has not been issued to promoters or others, whether it be for mere influence or otherwise.

Our own courts favor this right, and the only difference is that the laws of Maine permit suits severally at law, or in equity either jointly or severally, without reference to equality of obligation, while this court has indicated its preference that equity, so far as practicable, should be worked out and the liability prorated. The question then is: Will the courts of Tennessee enforce the action against one stockholder?

The liability of a stockholder in a foreign corporation for the debts of such corporation is to be determined by the laws of the State of incorporation. If the liability is in the nature of contract, and is not opposed to the legislation or public policy of the State in which it is sought to be enforced, the courts will enforce it. If the liability is penal in its nature, it will not be enforced outside of the State creating it. *Woods v. Wicks*, 7 Lea, 40.

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This is not a penal statute, and the remedy given, while statutory, is in accord with the law of Tennessee, except the feature that this is a suit against one stockholder alone, and does not seek to adjust the equities.

Inasmuch as our courts favor the right sought to be enforced, the mere difference in the form of the remedy is not so materially opposed to the public policy of this State as to justify a refusal to recognize, *ex comitate*, the mode of procedure provided by the laws of Maine.

But, regardless of comity, it is the duty of the court to enforce this obligation in the manner provided by the laws of Maine. This obligation is in a sense contractual, for every creditor deals with the corporation in view of the statutes of the State of its organization, and the obligation arises upon the contract of subscription to the capital stock of the corporation. The action to enforce the same is transitory. It may be brought in any court having jurisdiction of such matters in any State where personal service can be made upon a stockholder. See *Whitman v. National Bank*, 176 U. S., 559, 20 Sup. Ct., 447, 44 L. Ed., 587.

It is said that the Lake View Traction Company was incorporated under a statute of Maine which forbids it doing business in that State; that no state is bound to recognize laws of one State which undertake to organize a corporation and by the very act of incorporation oust it from that State; that to do so would be to recognize the right of one State by an act

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of sovereignty to legislate into being an artificial body for some other State.

Counsel for defendant quotes from Code of 1903, p. 434, ch. 47, sec. 6, insisting that this authorizes a charter which must go into other States. This section in part as quoted is as follows:

“In all such cases the articles of agreement and certificate of organization shall state that such business is to be carried on only in States and jurisdictions when and where permissible under the laws thereof,” etc.

Counsel then quotes from the charter of the Lake View Traction Company, as follows:

“All such powers are to be exercised and such business is to be carried on only in other States and jurisdictions when and where permissible, under the laws thereof.”

It is to *only* do business where permissible, but we fail to see by the language that it ousts the corporation from the State of Maine.

We think defendant's contention as to interest is not sound. He insists that no right of action arose on behalf of the receiver for this unpaid stock until it was found that the other assets were insufficient to pay debts, and from this assumption he reasons that interest is not chargeable.

There are many authorities holding that interest cannot be charged under statutes providing individual, proportionate or double liability beyond the par value of the stock. The reasoning is sound as to actions of that nature because no liability exists against the

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stockholder for individual liability until the necessity for its collection arises. That liability does not attach until the assets of the corporation prove inadequate. In this case, however, the liability to pay the par value of all stock arose from the time the stock was received. The act of the officials in granting a bonus of stock was in violation of law and *ultra vires*. The statute of Maine provided that no payment should be deemed a payment within the purview of that chapter, unless *bona fide* made in cash or in some other matter or things at a *bona fide* and fair valuation thereof. Therefore, since the cause of action arises from an illegal issuance of the stock, the interest must be counted from that time. The failure to require payment for all stock issued no doubt materially contributed to the insolvency.

The decree of the chancellor is in all things affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1915.

SANFORD-DAY IRON WORKS *v.* MOORE.*

(*Knoxville*. September Term, 1915.)

MASTER AND SERVANT. Liability for injuries. Conformity to customary usage.

A defense conclusive in character is not made out by a showing on the part of an employer that, in respect to appliances or places of work furnished by him, he has conformed to the usage obtaining among employers of like character in the district, and though proof of conformity to customary usage makes a prima-facie case of nonliability when nothing else appears, this case is subject to be rebutted by proof that the appliance where set for use, or the place of work, was one so inherently and flagrantly dangerous that it must have been obviously so to the employer.

Cases cited and approved: *Kilbride v. Carbon, etc., Co.*, 201 Pa., 552; *Chattanooga Mach. Co. v. Hargraves*, 111 Tenn., 476;

*On the effect of custom and usage as affecting measure of master's duty to guard machinery see note in 16 L. R. A. (N. S.), 140.

As to furnishing for servant's use article in general use as measure of master's duty see notes in 16 L. R. A. (N. S.), 126, 27 L. R. A. (N. S.), 181.

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Prattville Cotton Mills v. McKinney, 178 Ala., 554; Winkler v. Power, etc., Co., 141 Wis., 244.

Cases cited and distinguished: Titus v. Bradford, etc., R. Co., 136 Pa., 618; Geno v. Fall Mountain Paper Co., 68 Vt., 568; Wabash R. Co. v. McDaniels, 107 U. S., 461; Texas, etc., R. Co. v. Behymer, 189 U. S., 468; Railroad v. Wade, 127 Tenn., 154.

FROM KNOX

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* from the Court of Civil Appeals to the Supreme Court.—VON A. HUFFAKER, Judge.

FOWLER & FOWLER and A. Y. BURROWS, for plaintiff.

WEBB & BAKER, for defendant.

MR. JUSTICE WILLIAMS delivered the opinion of the Court.

The Sanford-Day Iron Works, a body corporate, engaged in the foundry and machinery business in Knoxville, appealed in error from a judgment for personal injuries rendered by the circuit court in favor of Moore, one of its employees, to the court of civil appeals, where the judgment was reversed for several errors in the charge of the trial judge, only one of which will be treated of in this opinion, the other points made by the parties under their respective petitions for *certiorari* being disposed of orally and in a memorandum for judgment handed down with this opinion.

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The employee, at the time of his injuries, was engaged in work as an assistant to one Flora at a forging hammer which was operated by means of a shaft, pulley, and belt, the shaft being located about twenty feet above the floor. About ten months before the accident the belt began to run off of the pulley, and Moore was directed at times, when the regular hand for that purpose was not conveniently near, to ascend and replace it, a ladder being used for that purpose. The replacement of the belt was usually done by Moore while the shaft was revolving. At a distance of from twenty to twenty-eight inches from the pulley was a hanger, which was held in place by a collar in which for the security of the collar was a setscrew. This screw had a square head, and projected above the surface of the collar about one-half inch or an inch.

On the day of the injury, Moore was on the ladder engaged in readjusting the belt, when, after it was placed on the pulley, it immediately flew off, knocking him against the rapidly revolving shaft and the setscrew. This screw caught his clothing, and he was wound around the shaft and his body bruised and mutilated.

The injured employee testified that he had never observed the setscrew and did not know it was there; he having always made the adjustment of the belt while the shaft was revolving.

There was also evidence offered tending to show that projecting setscrews were still in use in well-regulated shops in the district, especially on overhead

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shafting, but there was also adduced evidence in behalf of the employee that such projecting screws were not in general use by prudent operators, and in well-regulated plants of like character, at the time the shaft in question was installed, and that they had been discarded and counter-sunk screws adopted for use in lieu, due to the greater safety of the latter.

The trial judge instructed the jury in part in the following language:

“You will bear in mind in this connection that the law did not require that the defendant use the very latest and most approved setscrew, unless it was necessary to do so in order to make said place reasonably and ordinarily safe. It was sufficient if defendant used such setscrew as was ordinarily in use by well-equipped plants and machinery of similar character, provided the same was ordinarily safe.”

Upon an assignment of error of the Iron Works attacking this portion of the charge because of its last and qualifying phrase, the court of civil appeals held that the charge was erroneous, saying:

“We think the unbending test of plaintiff in error’s negligence in using said projecting setscrew in its machinery, at the time of the accident, was the ordinary usage of the business.”

That court quoted from the case of *Kilbride v. Carbon, etc., Co.*, 201 Pa., 552, 51 Atl., 347, 88 Am. St. Rep., 829, the language of which, on the point under discussion, was taken from the earlier and leading case of

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Titus v. Bradford, etc., R. Co., 136 Pa., 618, 20 Atl., 517, 20 Am. St. Rep., 944, where it was said:

“All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, ‘reasonably safe’ means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community.”

It is in behalf of the Iron Works contended that this court adopted the principle that conformity to

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the common usage in the particular line of business is the unbending test of nonculpability, thus announced in these Pennsylvania cases, in *Chattanooga Machinery Co. v. Hargraves*, 111 Tenn., 476, 482, 78 S. W., 105, when it quoted the substance of the above excerpt from *Kilbride v. Carbon, etc., Co.*, supra. It should be noted, however, that it was the plaintiff in that case who was claiming negligence on the part of the defendant company and who was seeking to prove that the employer company had not been reasonably careful in that it had failed to practice a method of testing the appliance that was in general use in well-regulated machine shops, and that was practiced by experienced and prudent machinists. The court merely held that evidence of such customary usage was competent to be adduced by the plaintiff. It was not ruled that same would be conclusive on the point of defendant's negligence in favor of the plaintiff. It is one thing to say that an employer may be found to be negligent if he fail to conform to a customary usage, and another thing to say that if he conforms he is thereby conclusively acquitted of culpability. The phase now presented was not dealt with in the *Hargraves Case*.

The Pennsylvania rule on the point has, however, been adopted in a number of jurisdictions. The earlier and some recent cases are cited in 3 Labatt, Master and Servant (2 Ed.), sec. 940.

The doctrine that conformity to common usage when established is conclusive in the employer's favor has been denied and combatted by the courts in several

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other jurisdictions, and it is believed that an increasing number of tribunals, as they rule the point, are aligning themselves in opposition to that view. The protestant view is expressed in the case (involving a projecting setscrew) of *Geno v. Fall Mountain Paper Co.*, 68 Vt., 568, 35 Atl., 475, where this language was used:

“It would hardly be a defense for an employer to say that a certain machine upon which an employee had been injured was one of a kind in common use, if the employer was compelled as a prudent man to admit its use was, in his own judgment, dangerous.

“ ‘Common use’ and ‘the care of a prudent man’ are not necessarily equivalent terms. That a machine is in common use is at most a circumstance bearing upon the question of negligence.

“A machine might be of a kind in common use, or even the best in use, and yet its safety in respect to its position or setting in a mill be questionable. In this case, even if the setscrew with a projecting head had been the most approved kind and in universal use, it could not be held as a matter of law that its employment, for that reason, would shield the defendant from liability.”

The same fundamental principle was announced by the supreme court of the United States in *Wabash R. Co. v. McDaniels*, 107 U. S., 461, 2 Sup. Ct., 938, 27 L. Ed., 605, where Mr. Justice Harlan wrote:

“And to say, as matter of law, that a railroad corporation discharged its obligation to an employee—in

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respect of the fitness of co-employees whose negligence has caused him to be injured—by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper care, and therefore not ordinary care within the meaning of the law.’’

See, also, *Texas, etc., R. Co. v. Behymer*, 189 U. S., 468, 23 Sup. Ct., 622, 47 L. Ed., 905.

Mr. Labatt in the work above referred to vigorously opposes the Pennsylvania rule at section 947, where other cases in accord with his views are collected, saying:

“In spite of the imposing array of authorities which have adopted the doctrine explained in sections 940 *et seq.*, the present writer has no hesitancy in saying that, in his opinion, the cases just cited embody the correct principle,’’ etc.

Among the later cases so holding are *Prattville Cotton Mills v. McKinney*, 178 Ala., 554, 59 South., 498;

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Winkler v. Power, etc., Co., 141 Wis., 244, 124 N. W., 273.

In our opinion the sounder view is that maintained by the cases denying the rule of application to the full extent laid down in the *Titus Case*; that is, holding that a defense conclusive in character is not made out by a showing on the part of an employer that in respect to appliances or place of work furnished by him he has conformed to the usage obtaining among employers of like character in the district. The contrary rule, said to be "unbending," lacks that flexibility that is required to reach a just result in certain cases, of which this one is a type.

The doctrine is too absolute in that it denies a jury the right to find the common usage to be an obviously negligent one; and, in effect, the right to find that such other employers are not in that respect men of ordinary care and prudence, which may be the truth. The fact may be that the customary usage has its basis on motives of economy, self-interest, or a reckless disregard of the subordinate, and not on consideration for the safety of the employee. Is supineness on the part of an isolated employer to be denounced while the same supineness if only it be found in aggregate is to be vindicated?

The rule that tends to cause vigilance in the protection of human life is to be preferred over one that tends to encourage concerted indifference.

While the point has not been passed on in any of our cases involving the relation of master and servant, it

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was said in *Railroad v. Wade*, 127 Tenn., 154, 153 S. W., 1120, Ann. Cas., 1914B, 1020, which was a case that involved the measure of care to be observed by a railway towards a licensee in its switching operations:

“It is proper to prove the customary way of doing such things in the business in hand, but such evidence is not controlling. It is competent only to throw light on the question, since a customary way may be a negligent way.”

We believe that proper rules may be formulated for cases such as this, as follows:

When such proof of conformity to customary usage is made by an employer, there is made a *prima facie* case of nonliability, nothing else appearing.

This case is, however, subject to be rebutted by the plaintiff employee showing by proof that the appliance where set for use or the place of work was one so inherently and flagrantly dangerous as that it must have been obviously so to the employer.

The court of civil appeals, however, as above indicated, passed on other assignments of error in favor of the Iron Works, and properly remanded the case for another trial. Without entering into a discussion here of its action in those respects, we approve the last-named rulings. The trial on remand will be in conformity to those rulings and to what is said in this opinion on the matter segregated for discussion.

STATE OF TENNESSEE
SUPREME COURT
OFFICE OF THE CLERK

To all Circuit and Criminal Court Clerks:

The following rules to be followed in making up transcripts for the Supreme Court in CRIMINAL CASES have been drawn up by the Attorney-General and approved by the Court. It is the order of the Court that they be substantially followed in preparing all transcripts in criminal cases.

FIRST: Each transcript is composed of two distinct parts: (1) the TECHNICAL RECORD, and (2) the BILL OF EXCEPTIONS. The complete Technical Record must be copied first, and then the complete Bill of Exceptions. The two parts must not be mixed in the transcript.

SECOND: The TECHNICAL RECORD is composed of all the *Minute Entries* pertaining to the case, including the indictment.

The caption of the term of court at which the indictment is returned should be the first thing copied into the transcript, but it is not necessary to copy the record of the organization of the Grand Jury, unless this has been attacked by plea in abatement or otherwise.

After the term caption, copy the record of the return of the indictment in open court by the Grand Jury, and the indictment itself, with all the endorsements appearing thereon. After this, copy all other minute entries in the case in the order in which they appear on the minutes.

If the trial is not had at the term at which the indictment is returned by the Grand Jury, then the term

caption of the trial term should also be copied preceding the record of the trial. It is not necessary, however, to copy the continuances entered in the case. The Court will presume that the proper order of continuance was made at each term, and no fees will be allowed for copying continuances into the transcript. If one or more terms intervene between the indictment and trial, at which nothing is done except to continue the case, no reference to such intervening terms need be made in the transcript.

It is important that the transcript show the date upon which each minute entry copied was made. The record of each day's proceedings in the trial court is preceded by a day caption and is concluded by the signature of the trial judge. This day caption and signature must be copied into the transcript so as to indicate the day on which the proceedings were had, and that the trial judge signed the minutes on that day.

THIRD: The BILL OF EXCEPTIONS is a document signed by the trial judge and filed within the time allowed. Every word contained in it and every endorsement thereon is important, and should be copied into the transcript. It should in no case be altered after the trial judge signs it, and the date of its filing should always be endorsed thereon.

No papers filed in the case which are neither copied on the *Minutes* nor made a part of the BILL OF EXCEPTIONS shall be copied into the transcript.

Papers such as affidavits, motions, the written charge of the trial judge, etc., may be made a part of the BILL OF EXCEPTIONS only when such papers are identi-

fied and made a part thereof by the signature of the *trial judge*. Hence, when the BILL OF EXCEPTIONS contains instruction to the clerk to copy certain papers (as for example: "The Clerk will here copy the motion for a new trial"), such instructions shall not be obeyed by the clerk unless the paper called for is identified as a part of the BILL OF EXCEPTIONS by the signature of the *trial judge* endorsed thereon. A failure to comply with this rule will result in the paper improperly copied being stricken from the record, and the forfeiture by the clerk of his fee for copying the transcript.

FOURTH: The disposition of the Accused pending the appeal should be noted on the cover of each transcript. If he is in jail, the words "in jail" should be written on the cover; if he is out on bond, the words "on bond", followed by the amount of the bond, should be written on the cover. A copy of the bail bond should in every case be forwarded with the transcript.

FIFTH: In addition to these rules, the Supreme Court has promulgated general rules for the guidance of clerks in preparing all transcripts for the Appellate Courts, which are published in Vol. 126 Tennessee Reports, (18th Cates) on pages 717-719, Section 358. These rules will be enforced in all cases.

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ACTIONS, RIGHT AND CAUSE.

1. *Torts. "Malicious" act. Justification.*

A "malicious" act is one injurious to another, intentional, and without legal justification, and is unlawful and actionable, but if an act, otherwise lawful, has a reasonable tendency to promote ends advantageous to the doer, malice in the doing does not bring it within the rule. *Hutton v. Watters*, 527.

2. *Limitation of actions. Flowage. Damages. Continuing damages.*

Where a railroad ditch along the right of way is allowed to fill up by the road's negligence, throwing water upon plaintiff's lands, depositing gravel and cinders, a distinct right of action arises with each wrongful act in the overflow or submergence of plaintiff's lands due to the railroad's negligence in failing to keep open the ditch. *Railroad Co. v. Roddy*, 568.

3. *Husband and wife. Rights of husband. Services of wife.*

The Married Women's Act (Laws 1913, ch. 26), which relieved married women from all disability on account of coverture, did not affect a wife's marital duties, and a husband, as at common law, may recover for loss of the services of his wife by reason of personal injuries sustained by her. *City of Chattanooga v. Carter*, 609.

4. *Master and servant. Action for injury. Sufficiency of declaration.*

In an action for the death of plaintiff's intestate while in the defendant's employ as a yard inspector, the declaration averred that it was customary for employees in defendant's yard to go under cars on the track during showers; that there was a rule under the federal and State law and of the Interstate Commerce Commission, adopted by defendant, that before a standing car would be moved in the yard notice would be given; that defendant and deceased were engaged in interstate commerce; that while he was inspecting cars in the yard deceased went under the car during a shower; and that defendant, in violation of the rule, switched cars against the one under which intestate was, and killed him. *Held*, that the dismissal of the action for failure to comply with a motion to make the declaration more

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specific, and to designate the name of the vice principals, etc., alleged to have been negligent, and what rule had been violated, was erroneous, as the declaration set out with particularity and in a substantial way the cause of action on which plaintiff sued, and as such matters were more within the knowledge of the defendant. *Lowry v. Southern Ry. Co.*, 630.

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ACCOUNTING.

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The captain of a steamboat dealt in cotton seed and other commodities on commission without the knowledge of his employers, who subsequently brought an action for an accounting for secret profits. *Held* that, although the transactions upon which the action was based were *ultra vires* the corporation, they were not *malum in se*, and profits made thereby with the aid of the company's name and the use of its employees were recoverable. *Packet Co. v. Agnew*, 265.

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Where a bank rendered a statement containing separate items of indebtedness in response to a debtor's request, and the latter thereupon made a tender of the amount stated, that the bank had erroneously omitted a particular item from the statement did not estop it from suing thereon; no one having been prejudiced by the making of such statement. *Fourth Nat. Bank v. Stahlman*, 369.

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AGREEMENTS.

Corporations. Stock. Contract for purchase.

An agreement between a bank and the promoter of a building corporation, whereby the latter agreed to purchase certain shares of stock owned by the bank, the bank reserving an option to sell the stock at any time to other persons, but providing that the promoter was to have the option to buy such stock at par and accumulated dividends at any time before the bank sold it to others, and providing for thirty days' notice to the promoter before selling, is an absolute and unconditional agreement to sell, and not a mere option. *Fourth Nat. Bank v. Stahlman*, 367.

ALIBI.

Criminal law. Evidence. Res gestae.

In a prosecution for murder, where an alibi was sought to be established by the testimony of defendant's sister that she was late in keeping an appointment with her lover because she could not leave the house on account of defendant's return at a certain hour, evidence of the lover that when she met him she gave him such reason for her lateness was not admissible as part of the *res gestae*. *Dietzel v. State*, 47.

ALLEGATIONS.

Pleading. Demurrer. Admission.

On demurrer the allegations of a bill must be taken as true. *Alexander v. Elkins*, 663.

APPEAL AND ERROR.

APPEAL AND ERROR.

1. *Trial. Infringement of jury trial. Withdrawal of evidence from jury. "Will." "Must." "Shall."*

Where the jury believe that a witness has sworn falsely and corruptly in one material respect, they may disregard the evidence altogether, except in so far as it is corroborated by other credible evidence; but an instruction that "you 'will' reject his testimony altogether" was equivalent to "shall" or "must" and erroneous as withdrawing from the jury all the evidence which they might deem of the character indicated and denying the parties the constitutional right of trial by jury. *Railroad v. Morgan*, 1.

2. *Harmless error. Instructions.*

Such error was not harmless, within chapter 32 of the Acts of 1911, providing that no verdict shall be set aside or new trial granted for error in the charge or any error, unless it affirmatively appears that it has affected the result of the trial. *Ib.*

3. *Assignment. Fundamental error.*

Error, in an instruction as to the credibility of a witness testifying falsely in one material particular, equivalent to a withdrawal of evidence of such character, and to a deprivation of the constitutional right of trial by jury, *held* to make it the duty of the supreme court to consider it as if it had been properly assigned. *Ib.*

4. *Criminal law. Harmless error. Exclusion of evidence.*

In a prosecution for murder, where, to establish an alibi, defendant's sister testified that she had seen him come home at a certain hour, and, to corroborate such sister, her lover gave certain testimony as to her having been slightly late to an appointment with him, such lateness, according to the sister's testimony, having been because she could not leave the house, as she did not wish her brother, the defendant, who had just returned, to see her, the exclusion of the lover's testimony that the girl had told him she was late because her brother was in the house was harmless, where, from testimony admitted, it must have been apparent to the jury that such was the explanation that the witness would have testified she gave him. *Dietzel v. State*, 47.

5. *Witnesses. Conduct of trial. Cross-examination by trial judge.*

In a criminal prosecution the action of the court in not permitting counsel for the State to cross-examine defendant and in

AUTOMOBILES.

APPEAL AND ERROR—Continued.

undertaking to do so himself, framing exceedingly sharp questions, and, after defendant's own counsel had had defendant for a short time, in resuming cross-examination which totaled one-third of the defendant's personal testimony, was reversible error. *Parker v. State*, 327.

6. *Witnesses. Impeachment of own witness. Character.*

In a criminal prosecution, where the defendant was called in rebuttal for the State, the action of the assistant district attorney-general in asking him whether his whole life for the past fifteen years had been so crooked, devious, and so utterly devoid of morality or honesty that his reputation for dishonesty was so well known that the county court, without even considering his petition, refused to give him a certificate of good character, notwithstanding the fact that defendant's general character had not been put in issue, was a denial of a fair trial and reversible error. *Ib.*

7. *Criminal law. Judgment on appeal. Presence of accused.*

Accused appealing from a conviction of a felony must be present when judgment is rendered on appeal, though he has been released on bond, and only under very special circumstances will the court reverse a judgment in a felony case where accused is under bond without requiring his presence in court. *Vowell v. State*, 349.

8. *Courts. Appellate jurisdiction. Test.*

Jurisdiction on appeal is to be tested by the matter in controversy on appeal, and not by the matters which may have been involved in the lower court. *Burns v. City of Nashville*, 429.

AUTOMOBILES.

Highways. Automobile accident. Obstructions. Contributory negligence.

A person who drove an automobile at night in a dark place on the highway so fast that he could not avoid an obstruction within the distance lighted by his lamps was guilty of contributory negligence, barring his recovery, though just before the accident the bright lights of an approaching automobile and a curve where his own light did not shine directly in the way the machine was going hindered him from seeing the obstruction. *Knoxville Ry. & Light Co. v. Vangilder*, 487.

BAILMENT—BANKS AND BANKING.

BAILMENT.

Accommodation bailments. Degree of care.

A bailee for the accommodation of the bailor is answerable only for his gross negligence or bad faith, the degree of care being measured, however, with reference to the nature of the article bailed. *Ridenour v. Woodward*, 620.

BANKS AND BANKING.

1. *Representation of bank by president. Individual fraud of officer. Notice to bank.*

Where the president of a bank used his mother-in-law's notes, deposited with him for collection, as security for a loan, which he, as president and acting for the bank, made to himself on his own note, he alone acting in the transaction, notice of the character of the notes as a trust deposit was imputed to the bank, since, although where an agent acts in fraud of his principal such agent's notice of the character of the transaction will not be imputed to the principal, nevertheless where such agent, as in the instant case, is the sole representative of the principal in the transaction, the principal is chargeable with notice; there being no room under the facts for the presumption that the agent dealing with his principal on his own account will not communicate his knowledge when it is to his interest to conceal it. *Smith v. Bank*, 147.

2. *"Cashier." Authority.*

A "cashier" of a bank is its chief executive officer, and as such is held out by the institution as having authority to act in accordance with the usage and practice obtaining in the conduct of the business by banking institutions, and, so acting, he will bind the bank in favor of third persons who possess no knowledge to the contrary, or as to limitations on his power. *Bank v. Bank*, 152.

3. *Cashier. Authority to issue drafts.*

Though a bank cashier has power to issue and sign drafts drawn on funds of his bank on deposit with a correspondent bank, he has no implied power to draw such drafts in his own favor, or in favor of a creditor in payment of his own debt, and the acceptor in such case is charged with notice. *Ib.*

4. *Cashier. Issuance of draft. Dual relation.*

Where a bank cashier, who was also president of a store company, drew a draft on his bank, signed by himself as president

BASTARDY.

BANKS AND BANKING—Continued.

of the company, in payment of a debt due from the company, and then drew a draft to order of the bank holding the store draft for collection, with notice of the dual relation, on the correspondent bank of the cashier's bank, and the draft was paid, the payees of the two drafts were not put on notice which would render them liable to refund the money to the cashier's bank on insolvency; the cashier embezzling the money and issuing the drafts without funds. *Bank v. Bank*, 152.

5. *Cashier. Issuance of drafts. Dual relation.*

A bank cashier is not forbidden by banking custom from drawing a draft in favor of a corporation of which he is president. *Ib.*

6. *National banks. Stock purchasing contract.*

A contract between a national bank and the promoter of a building corporation, whereby the promoter was to purchase from the bank stock subscribed for by it, was not *ultra vires* of the bank, the stock having been taken by the bank as part of a transaction for the renting of banking quarters. *Fourth Nat. Bank v. Stahlman*, 367.

7. *National banks. Powers. Purchase of stock.*

Under Rev. St. U. S., sec. 5137 (U. S. Comp. St. 1913, sec. 9674), providing that a national bank may purchase and hold real estate necessary for its immediate accommodation in the transaction of its business, and section 5136 (section 9661), providing that such bank may exercise all incidental powers necessary to carry on the business, a national bank may acquire and hold stock in a building corporation as part of a transaction for renting desirable banking quarters; good faith being the test whether such investment is legitimate. *Ib.*

8. *National banks. Power to purchase stock.*

While it is unlawful for a national bank to deal in stocks, it may loan money on shares of other corporations, and in order to collect the debt may purchase the stock, or may acquire it to protect itself against loss in compromising a doubtful liability. *Ib.*

BASTARDY.

1. *Slaves. Persons born in slavery. Status.*

A person born of parents while in a state of slavery is regarded as a bastard, as the state of bondage precluded the husband

BILL OF EXCEPTIONS—BILLS AND NOTES.

BASTARDY—Continued.

and wife yielding to each other the duty, fealty, and protection that the law requires, and because of incapacity to contract; it following necessarily there was no lawful issue, as there was no lawful marriage in such cases. *Cole v. Taylor*, 93.

2. Proceedings. Jurisdiction of justice.

Shannon's Code, sec. 7332, provides that any justice of the peace upon his own knowledge, or information made to him, that any single woman within his county is delivered of a living child, may cause such woman to be brought before him for examination touching the father. Sections 7333 and 7334, respectively, provide means for ascertaining the name of and summoning the putative father, while section 7344 recites that the proceeding is to relieve the county of the support of the child. Section 7347 declares that the county court shall make no provision for a bastard, except when likely to become a county charge. The mother of an illegitimate child removed from one county to another shortly after its birth. *Held*, that a justice of the county to which she removed had jurisdiction of the proceeding to compel the putative father to support the child *State ex rel. v. Kirk*, 219.

BILL OF EXCEPTIONS.**Insertion of exhibits. Authentication.**

Papers identified and made exhibits to the respective depositions by the notary public taking them, need not be identified or authenticated by a chancellor or trial judge in order to their incorporation into a bill of exceptions, as this is sufficiently done by the identifying signature of the notary public incorporating them as part of the deposition. *Casualty Co. v. Parsons*, 217.

BILLS AND NOTES.**1. Consideration. Antecedent debt.**

Although under the Negotiable Instruments Law (Laws 1899, ch. 94) a pre-existing debt may stand for value, yet, where the maker of a note made it payable directly to plaintiff bank, which paid him nothing therefor, he being induced to make the note by the bank's cashier, who was practically the owner of an insolvent corporation which owed the bank money, to reduce which debt the note was applied, there could be no recovery by the bank on such note, since a pre-existing debt

BILLS AND NOTES.

BILLS AND NOTES—Continued.

is not consideration for a note, where the debt was worthless and the obligation of a third party. *Trust Co. v. McDougald*, 323.

2. *Release of attorney's fees. Effect of tender.*

A tender by a debtor of full payment of a note, constituting one of several items of indebtedness, was sufficient to exonerate him from the payment of attorney's fees stipulated therein; the note not being disputed. *Fourth Nat. Bank v. Stahlman*, 367.

3. *Pledges. Security for loans. Debts secured. "Obligation."*

Collateral deposited with a bank to secure a promissory note, written on the blank form furnished by the bank and reciting that such collateral "shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of this obligation. All such securities in their hands shall stand as one general continuing security for the whole of such obligations, so that the deficiency on any one shall be made good from the collateral upon the rest"—may be held by the bank to secure the performance of a contract previously executed, whereby the pledgor agreed to purchase certain corporate stock from the bank, such contract constituting an "obligation" within the recitals of the note. *Ib.*

4. *Pledges. Security for loans. Application of collateral.*

Where collateral has been deposited with a bank to secure a promissory note, reciting that the collateral shall be applicable in like manner to secure the payment of any other obligations of the undersigned, whether past or future, held by the holder of such obligation, such language will not be construed to mean that another bank, to which the holder might transfer the note with its collaterals, can hold them as security for other debts which the maker might have created with such other bank, since such other debts would not have been in the contemplation of the parties when the loan was made. *Ib.*

5. *Application of collateral to other debts. Surety's right of subrogation.*

Where collateral has been deposited with a bank to secure a promissory note, reciting that such collateral may be applied to all other obligations of the maker to the bank, a surety or indorser who pays such note will be subrogated to the place of the bank as to such collaterals, which right may not be de-

BURDEN OF PROOF—CERTIORARI.

BILLS AND NOTES—Continued.

feated by the application of the collaterals to any other debts owing by the maker to the bank. *Id.*

6. *Corporations. Corporate existence. Estoppel to deny.*

Where a note was made payable to the Ingle System Company, and there was nothing else to show the nature of the company, the payee is estopped to deny the company's corporate existence, for it may be assumed that such company was a corporation; the name not being particularly applicable to a firm. *Ingle System Co. v. Norris & Hall*, 472.

7. *Constitutional law. Imprisonment for debt. Writ of ne exeat.*

There was a deficiency in a parcel of land, which was sold by the acre. The vendor removed from the State and returned to collect notes for the purchase price. These were on his person. Shannon's Code, sec. 6246, authorizes the issuance of a writ of *ne exeat*. *Held*, that in such case, as the vendor might remove and negotiate the notes, thus depriving the purchaser of his remedies, the writ of *ne exeat* would issue; the issuance in such case not being equivalent to an imprisonment for debt prohibited by Const., art. 1, sec. 18. *Caughron v. Stinespring*, 636.

BURDEN OF PROOF.

Railroads. Injuries to persons on tracks. Duty of care.

Under Shannon's Code, sec. 1574, subd. 4, declaring that every railroad company shall keep a lookout, and, when any person or other obstruction appears on the track, take all means to prevent an accident, and section 1576, declaring that no railroad company that observes such precautions shall be responsible for damage done to persons on its road, one suing for the death of her intestate, killed on defendant's road, has the burden of showing that such intestate was on or so near the track as to be an obstruction before the railroad company is bound to show that it observed the statutory precautions. *C., N. O. & T. P. R. Co. v. Brock*, 477.

CERTIORARI

1. *Jurisdiction. Supreme court.*

Under Acts 1907, ch. 82, sec. 8, providing for the review by the supreme court upon *certiorari* of the cases appealed to the court of civil appeals, the supreme court can take jurisdiction of such cases only through the writ of *certiorari*, and only after final

 CODE CITED AND CONSTRUED.

CERTIORARI—Continued.

decree or judgment in the court of civil appeals, and is without power to review the interlocutory orders of that court or its judges in matters within its jurisdiction. *Burns v. City of Nashville*, 429.

2. Review. Questions presented.

Where a judgment for plaintiff was reversed by the court of civil appeals, and the defendant did not by its own petition and assignment of error present for review by the supreme court the holding that the denial of its motion for a peremptory instruction was not error, the question is not open to review on *certiorari* brought by plaintiff. *C., N. O. & T. P. R. Co. v. Brock*, 477.

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COMPENSATION.

Damages. Property.

Compensation for injury being the rule, the owner of an automobile used for pleasure may recover substantial damages for loss of use while it is being repaired after a torious injury by defendant. *Perkins v. Brown*, 294.

 CONSTITUTION CITED AND CONSTRUED.

CONSTITUTION CITED AND CONSTRUED.

- §2, art. 9. Insurance. Mutual benefit insurance. Forfeiture. Residence in prohibited territory. "Residing." *Laue v. Grand Fraternity*, 235.
- § 3, art 9. Insurance. Mutual benefit insurance. Forfeiture. Residence in prohibited territory. "Residing." *Laue v. Grand Fraternity*, 235.
- § 4, art. 7. Highways. Good roads commissioners. Filling vacancies. *Todtenhausen v. Knox County*, 169.
- § 6, art. 1. Jury. Right to jury. "Cases triable by jury." *Ferris v. Bloom*, 466.
- §§ 6, 8, 9, art. 1. Jury. Separation. Effect. *Long v. State*, 649.
- § 8, art. 11. Statutes. Special legislation. Counties. *Todtenhausen v. Knox County*, 169.
- §§ 8, 12, art. 11. Schools and school districts. Consolidation of schools. Discretion of officers. Transportation of pupils. Statute. Constitutionality. *Cross v. Fisher*, 31.
- §§ 9, 13, art. 1. Criminal law. Appeal. Presence of accused during hearing on appeal. "In all criminal prosecutions." *Vowell v. State*, 349.
- § 14, art. 6. Intoxicating liquors. Offenses. Sentence and punishment. "At the discretion of the court." "And." "Or." Jury. Right to jury. Assessment of punishment. Court. *State v. White*, 203.
- § 17, art. 2. Statutes. Bills and subject. County roads. Single subject. *Todtenhausen v. Knox County*, 169.
- § 17, art. 2. Statutes. Title. Sufficiency. *Parlow v. Turner*, 339.
- § 17, art. 2. Schools and school districts. Consolidation of schools. Discretion of officers. Statute. *Cross v. Fisher*, 31.
- § 17, art. 11. Highways. "County officer." Good roads commissioners. Filling vacancies. *Todtenhausen v. Knox County*, 169.
- § 17, art. 11. Schools and school districts. Officers. Constitutional and statutory provisions. "County officers." "Employee." *Cross v. Fisher*, 31.
- § 18, art. 1. Constitutional law. Imprisonment for debt. Writ of *ne exeat*. *Caughron v. Stinespring*, 636.
- § 18, art. 2. Statutes. Enactment. Reading *Helskell v. Knox County*, 180.
- § 21, art. 2. Evidence. Judicial notice. Legislative journals. *Todtenhausen v. Knox County*, 169.

 CONSTITUTIONAL LAW.

CONSTITUTION CITED AND CONSTRUED—Continued.

- § 25, art. 2. Officers. Eligibility. Constitutional and statutory provisions. Defaulter. *Hogan v. Hamilton Co.*, 554.
- § 29, art. 2. States. Credit. State university. County aid. *Heiskell v. Knox County*, 180.

CONSTITUTIONAL LAW.

1. *Equal protection of law. Slave marriage. Legitimacy of issue.*
The court was not forbidden by Const. U. S. Amend. 14, to hold that, for purposes of inheritance, the issue of a slave marriage contracted in Louisiana and there terminated before emancipation, was illegitimate. *Napier v. Church*, 111.
2. *Statutes. Special legislation. Counties.*
Const. art. 11, sec. 8, inhibiting the suspension by the legislature of any general law for the benefit of any particular individual, does not prevent a special act for the benefit of a county, like Priv. Acts 1915, ch. 117, authorizing a county to issue and sell bonds for highways. *Todtenhausen v. Knox County*, 169.
3. *Statutes. Single subject.*
Within Const. art. 2, sec. 17, the subject of a statute is single when the statute has but one general object, or purpose, however many be the means provided for effecting it. *Ib.*
4. *Highways. Good roads commissioners. Filling vacancies.*
The provision of Priv. Acts 1915, ch. 117, that vacancies in the temporary good roads commission thereby created for Knox county shall be filled by the remaining commissioners is authorized by Const. art. 7, sec. 4, providing that the election of all officers, and the filling of vacancies not otherwise directed by the constitution shall be made in such manner as the legislature shall direct. *Ib.*
5. *Statutes. Enactment. Reading.*
Const. art. 2, sec. 18, requiring a bill to be read and passed in each house on three separate days, is satisfied, where it is introduced in duplicate in the two houses, and the Senate bill, after passing its third reading and being enrolled, is on the third reading in the house substituted for the house bill and passed. *Heiskell v. Knox County*, 180.
6. *Intoxication liquors. Offenses. Sentence and punishment. "At the discretion of the court." "And." "Or."*
Under Acts 1905, ch. 422, sec. 1, making it unlawful to buy for another any intoxicating liquors within four miles of any school-

CONTEMPT—CONTRACTS.

CONSTITUTIONAL LAW—Continued.

house, and the violation thereof a misdemeanor, punishable upon conviction by a fine "and imprisonment for a period of not less than thirty days nor more than six months, at the discretion of the court." the conjunction "and," while ordinarily expressing the relation of addition, has the meaning "or," and the words "at the discretion of the court" give the court a discretion as to whether imprisonment shall be assessed. *State v. White* 203.

CONTEMPT.

1. *Publications relating to pending litigation. Power of court.*

It is the inherent right and power of courts to punish for contempt publishers of newspapers who, pending the trial of a case print matter for public circulation which is calculated to impede, embarrass, or affect the orderly trial and disposition of the case being heard. *Tate v. State*, 131.

2. *Publications relating to pending litigation. Power of court. Statute.*

Under Shannon's Code, sec. 5918, regulating the power of the courts to punish for contempts, where, during the pendency of a widely followed will case, the defendant's newspaper published a scare-head article, relating to the withholding from evidence by the court, after the jury had retired, of affidavits by a subscribing witness to the will, which article suggested that such subscribing witness had gone over to the contestants, which must have come to the knowledge of the jury, and so was calculated to destroy the effect of his previous testimony favoring the will, such publication was within the statutory power of the court to punish as a contempt. *Ib.*

CONTRACTS.

1. *Consideration. Mutual promises.*

A contract between a national bank and the promoter of a building corporation, whereby the promoter agreed to purchase from the bank building corporation stock held by it, in consideration that the bank would pay its subscription for the stock, was not void as being unilateral; the obligation to sell and buy being mutual. *Fourth Nat. Bank v. Stahlman*, 367.

2. *Corporations. Transfer of stock. Unpaid dividends.*

A contract between a bank and the promoter of a building corporation, whereby the promoter agreed to buy certain guaran-

CONVERSION.

CONTRACTS—Continued.

teed six per cent. cumulative preferred stock in the building corporation from the bank, and that if any dividends upon such stock remained unpaid at the time of purchase the promoter was to pay the accumulated dividends at the rate of six per cent. per annum, bears interest as upon a loan, and the promoter is liable for guaranteed dividends unpaid by the corporation, although not earned nor declared by it. *Ib.*

3. *Pledges. Security for loans. Application of collateral.*

Where the language of a note made to a bank by its customer, under which collateral is deposited as security, is unambiguous, and plainly shows that the parties contemplated that such collateral might be held as security for all other legal obligations or liabilities, the contract will be so construed, it being only where the language is ambiguous and the meaning doubtful that its provisions will be limited to a restricted class of obligations presumed to have been in the contemplation of the parties when the contract was made. *Ib.*

4. *Corporations. Corporate existence. Right to deny.*

When a private person enters into a contract with a purported corporation, he thereby admits the existence of a corporation; and hence, if the payee of a note is described by a corporate name, the maker is estopped to deny the corporate existence. *Ingle System Co. v. Norris & Hall*, 472.

5. *Evidence. Parol evidence. Contract of sale. Deficiency. Recovery.*

In a suit to recover for a deficiency in a parcel of land, the price per acre may be shown by parol, though not stated in the deed, the real contract between the parties governing. *Caughron v. Stinespring*, 636.

6. *Vendor and purchaser. Deficiency. Actions. Evidence.*

In a suit to recover for a deficiency in a parcel of land, parol evidence, showing the terms of the contract as to the price and number of acres, must be clear and certain; those matters not being stated in the deed. *Ib.*

CONVERSION.

Bailment. Accommodation bailment. Liability of bailee.

Plaintiffs delivered money and checks to defendant salesman to carry to another town and deposit to their credit. Being warned by the bookkeeper of the house for which the salesman traveled

CORPORATIONS

CONVERSION—Continued.

as to danger of carrying the money to his house, he made it his custom to deposit the funds in an iron safe of a drug company, because he arrived at the place of deposit after banking hours. A deposit against which the merchants notified him they had drawn was placed in the drug company's iron safe, and, when the salesman who had been otherwise engaged called for it two days later, it had disappeared. *Held* that, as every parting with an article bailed will not work a conversion, the salesman was not guilty of converting the fund, though he did not deposit it the earliest possible moment. *Ridenour v. Woodward*, 620.

CORPORATIONS.

1. *Powers of foreign corporations. Actions. Accounting.*

That a corporation has failed to comply with the law requiring every foreign corporation to file a certified copy of its charter with the secretary of State, and is therefore doing business in violation of law, does not prevent it from requiring its officers and employees to account for secret profits made with the company's money and credit. *Packet Co. v. Agnew*, 265.

2. *Ultra vires acts. Accounting.*

The captain of a steamboat dealt in cotton seed and other commodities on commission without the knowledge of his employers, who subsequently brought an action for an accounting for secret profits. *Held* that, although the transactions upon which the action was based were *ultra vires* the corporation, they were not *malum in se*, and profits made thereby with the aid of the company's name and the use of its employees were recoverable. *Ib.*

3. *Corporate existence. Right to deny.*

When a private person enters into a contract with a purported corporation, he thereby admits the existence of a corporation; and hence, if the payee of a note is described by a corporate name, the maker is estopped to deny the corporate existence. *Ingle System Co. v. Norris & Hall*, 472.

4. *Stockholders. Holding without subscription.*

Where statutes provide for recovery of the unpaid balance on stock only in case of "subscription to or agreement for" the stock, the actual taking of the shares will support the action: on express agreement being necessary. *Sullivan v. Farnsworth*, 691.

COUNTY OFFICERS.

CORPORATIONS—Continued.

5. *Liability of stockholders. Jurisdiction. Laws of other states. Comity.*

Although, under the general rule that stockholders may be compelled to pay up their stock in full for the benefit of creditors, in Tennessee it must appear that other assets, when collected, are insufficient, and all holders of stock not fully paid up must be made parties, so as to apportion the loss equitably among them, nevertheless, where the stock is that of a foreign corporation, the relation of the holder being contractual and entered into in contemplation of the laws of the State of incorporation, those laws govern, and the courts of Tennessee will enforce the remedy they provide against a single stockholder, in so far as that remedy is not penal. *Ib.*

6. *Organization. Powers. Other states.*

Rev. St. Me. 1903, ch. 47, sec. 6, providing for the incorporation of companies to carry passengers and freight in other States, and that "in all such cases the articles of agreement and certificate of organization shall state that such business is to be carried on only in States and jurisdictions when and where permissible under the laws thereof" is not void as attempting to create a corporation in one State in which it is prohibited to operate, but is merely restrictive of the right of such corporation to do business, limiting it to the States whose laws also permit its operation. *Ib.*

COUNTY OFFICERS.

1. *Schools and school districts. Officers. Constitutional and statutory provisions. "Employee."*

Acts 1913, ch. 4, sec. 3, giving boards of education authority to employ supervisors of schools, whose duty shall be to assist county superintendents in the organization, gradation, and supervision of schools, etc., and to pay them out of the respective school funds of counties, etc., does not violate Const., art. 11, sec. 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county courts, since the appointees contemplated by the act are not "county officers," but mere "employees." *Cross v. Fisher*, 31.

2. *Highways. Good roads commissioners.*

The members of the good roads commission created and named by Priv. Acts 1915, ch. 117, merely to superintend the expenditure of a bond issue on roads in Knox county, are not "county

 COURTS OF APPEALS—CRIMINAL LAW.

COUNTY OFFICERS—Continued.

officers" within Const. art. 11, sec. 17, providing no county office created by the legislature shall be filled except by the people or the county court. *Todtenhausen v. Knox County*, 169.

COURTS OF APPEALS.

Appeal and error. Remand. Discretion of court.

A reviewing court may, in its discretion, qualify the order of remand so as to restrict the scope of the new trial ordered. *Perkins v. Brown*, 294.

CRIMES AND PUNISHMENTS.

Intoxication liquors. Offenses. Sentence. "At the discretion of the court." "And." "Or."

Under Acts 1905, ch. 422, sec. 1, making it unlawful to buy for another any intoxicating liquors within four miles of any schoolhouse, and the violation thereof a misdemeanor, punishable upon conviction by a fine "and imprisonment for a period of not less than thirty days nor more than six months, at the discretion of the court," the conjunction "and," while ordinarily expressing the relation of addition, has the meaning "or," and the words "at the discretion of the court" give the court a discretion as to whether imprisonment shall be assessed. *State v. White*, 203.

CRIMINAL LAW.

1. *Felony. Presence of accused during trial.*

In a felony case accused must be present during his trial in the circuit court, criminal court, or other court of original jurisdiction. *Vowell v. State*, 349.

2. *Appeal. Presence of accused during hearing on appeal. "In all criminal prosecutions."*

In a felony case accused, confined in the penitentiary under Acts 1901, ch. 102, pending his appeal, or at large on bond, need not be present in the supreme court when hearing or deciding the case, notwithstanding Const., art. 1, sec. 9, providing that in all criminal prosecutions accused shall have the right to be heard by himself and his counsel, which applies only to the trial court; the phrase "in all criminal prosecutions" applying only to a trial prosecuted by the State, which does not include a review on appeal or writ of error, which is a proceeding brought by accused himself. *Ib.*

CURTESY—DAMAGES.

CURTESY.

Wife's separate estate. Devise.

In the Married Woman's Act (Acts 1869-70, ch. 99), section 3 of which provided that married women owning a separate estate should have the power to dispose thereof by deed or will the same as single women, and section 6 of which provided that the act, except section 3, should embrace only such married women as were living apart from their husbands or whose husbands were insane, provided all married women owning any land of any sort or description should have full power to dispose thereof by will as fully as if they were single. but such testamentary disposition should not be construed to defeat any husband's tenancy by curtesy therein, the exception of separate estates from the first part of section 6 does not apply to the latter part of the section, concerning wills, and the husband takes a life estate by curtesy in the separate estate of his wife, the settlement of which did not exclude his curtesy and which was devised to her by others. *Larkin v. Lightburne*, 277.

DAMAGES

1. *Property. Measure.*

The owner of a vehicle held for use may recover for his loss of use by reason of a tortious injury while being repaired, in addition to the cost of repairs. *Perkins v. Brown*, 294.

2. *Property. Compensation.*

Compensation for injury being the rule, the owner of an automobile used for pleasure may recover substantial damages for loss of use while it is being repaired after a tortious injury defendant. *Ib.*

3. *Injuries to property. Measure.*

That the owner of a pleasure motor car did not hire another car while it was being repaired after a tortious injury by defendant does not prevent him from recovering damages for loss of use thereof. *Ib.*

4. *Property. Measure.*

The owner of a motor car, held for pleasure driving and used only a small portion of each day, cannot, where the car was injured through the fault of defendant, recover as damages for the loss of the use of the machine the full daily rental value of machines in that vicinity. *Ib.*

DEBTOR AND CREDITOR—DEFENSES.

DAMAGES—Continued.

5. *Appeal and error. Remand. Order of remand.*

Where the only question as issue was the measure of damages, the appellate court, on reversal of a judgment for plaintiff, will qualify the order of remand so as to determine only the matter of damages. *Perkins v. Brown*, 294.

6. *Limitation of actions. Flowage. Limitations.*

Where defendant railroad, by allowing the ditch along its road-bed to become filled up, periodically inundated plaintiffs' adjacent lands, depositing gravel and cinders, the only damages recoverable were those caused by the deposit of gravel within the period of the statute of limitations, taking the value of the land at beginning of the period as normal, although it was then covered with gravel deposited by previous floodings, as to which plaintiffs' causes of action were barred. *Railroad Co. v. Roddy*, 568.

DEBTOR AND CREDITOR.

Pledges. Release of securities. Tender.

Where a creditor holds securities as collateral for several items of indebtedness, a tender by the debtor which does not include all such items does not operate to release the securities. *Fourth Nat. Bank v. Stahlman*, 367.

DEEDS.

Acknowledgment. Defects. Cure by registration deeds.

Under Shannon's Code, secs. 3761, 3762, relating, respectively, to presumptions on registration twenty years old and on registration thirty years old, the fact that a deed had been registered since December 24, 1834, cured any defects in the acknowledgment thereof. *Daniel v. Coal & Iron Co.*, 501.

DEFENSES.

1. *Injunction. Criminal proceedings. Prosecuting under unconstitutional act.*

Where the father of a girl threatened her husband, whom she had left, 'with interminable criminal prosecutions under a statute which the supreme court had declared unconstitutional, unless he contributed to her support, having procured a justice of the peace who was willing to issue warrants for such husband's arrest whenever demanded, such husband could restrain

DEMURRER.

DEFENSES—Continued.

the father and justice from effecting such series of prosecutions, since the rule that courts of equity cannot enjoin threatened criminal proceedings under a statute enacted by the legislature in the exercise of its police power has no application to prosecutions threatened under acts adjudged unconstitutional by the supreme court, as a warrant of arrest, charging a party with a violation of such an act, is absolutely void, and if by collusion between an officer and a private citizen the latter is suffered to procure warrants of arrest and the purpose is expressed by such citizen to continue the procurement of false warrants if money demanded is not paid, and if the officer agrees to continue to issue them and to cause the defendant to be arrested on them until he comply with the demand to pay money, such defendant is not relieved of the illegal persecution by the facts that the warrants in fact and law charge no crime, and that he has an adequate defense as against them in any court of competent jurisdiction. *Alexander v. Elkins*, 663.

2. *Master and servant. Liability for injuries. Conformity to customary usage.*

A defense conclusive in character is not made out by a showing on the part of an employer that, in respect to appliances or places of work furnished by him, he has conformed to the usage obtaining among employers of like character in the district, and though proof of conformity to customary usage makes a prima-facie case of nonliability when nothing else appears, this case is subject to be rebutted by proof that the appliance where set for use, or the place of work, was one so inherently and flagrantly dangerous that it must have been obviously so to the employer. *Iron Works v. Moore*, 709.

DEMURRER.

1. *Torts. Injury to business. Liability.*

Plaintiff's petition alleged that she operated a boarding house near a school of which the defendant was president; that the defendant, having disagreed with one boarder at the plaintiff's house, demanded his ejection therefrom and was refused; that he, with others, then attempted to, and did, destroy the plaintiff's business, by threats against students who boarded with the plaintiff, by deterring new arrivals from going to the plaintiff's house, and by other means; that the plaintiff was of good character, and operated a reputable house; and that the

DESCENT AND DISTRIBUTION—DEVISAVIT VEL NON.

DEMURRER—Continued.

defendants acted from ill will, and not by reason of business rivalry or competition. *Held*, that the declaration was not demurrable, the facts showing a cause of action, even though the act itself was lawful, if the defendant was actuated by malice and destroyed the plaintiff's business without reasonable advantage to himself, since every person has the right to conduct a lawful business and to have that right enforced or the wrong redressed if the right is infringed upon. *Hutton v. Waters*. 527.

2. *Pleading. Admission.*

On demurrer the allegations of a bill must be taken as true. *Alexander v. Elkins*, 663.

DESCENT AND DISTRIBUTION.

1. *"Inheritance." What law governs. "Natural right."*

The State possesses the power to prescribe the laws under which property within the State may descend, and may preclude any other mode or law of descent, and, being the sovereign of the soil, the policy of its laws as to the descent of real property is paramount to that of the legal *status* of persons coming from foreign countries in case of a conflict of laws; "inheritance" not being a "natural or absolute right," but purely a creature of statutory law governed by the *lex rei sitae*. *Cole v. Taylor*, 93.

2. *Legitimacy. Controlling law.*

While, as to the right of inheritance, the *status* of a party as to legitimacy depends upon the law of the domicile of the parents, nevertheless where such State is foreign to that of the decedent at the time of his death, where his property is situated, the laws of such State, as to the party's right of inheritance, are not controlled by those of the foreign State, since every State determines for itself what classes of persons may inherit property owned by citizens in the State at the time of their death. *Napier v. Church*, 111.

DEVISAVIT VEL NON.

Jury. Jury trial. Waiver. "Civil suit."

Shannon's Code, sec. 3912, providing that the issue of *devisavit vel non* shall be tried by jury, was enacted prior to Acts 1875, ch. 4, as amended by Acts 1889, ch. 220 (Shannon's Code, secs.

EJECTMENT.

DEVISAVIT VEL NON—Continued.

4611-4616), providing that failure to demand a jury in the method provided should constitute a waiver of the right to jury trial. *Held*, that, as the legislature must have known that an issue *devisavit vel non* was a civil suit, the subsequent acts apply to trial of that issue, and a contestant's failure to demand a jury trial is a waiver of the right. *Ferris v. Bloom*, 466.

EJECTMENT.

1. *Tenancy in common. Adverse possession. Evidence.*

In ejectment, wherein plaintiffs relied upon the adverse possession of their remote grantor, evidence that such grantor had continued to reside on the land after the death of his mother intestate; that he occupied free of rent except to keep up the improvements and pay the taxes; that he recognized that his holding was only for life, and only occasionally claimed that he owned the entire land—was not such clear and unequivocal proof as was necessary to show a holding to the exclusion of the cotenants to their knowledge. *Drewery v. Nelms*, 254.

2. *Husband and wife. Adverse possession. Pleading coverture.*

In ejectment, plaintiffs relied upon the presumption of a grant by lapse of time to their remote grantor, who had lived upon the premises, which were originally owned by his mother, for more than twenty years after her death. Defendant claimed under a deed from a sister of such grantor, purporting to cover her share as heir of her mother. This sister was married when plaintiff's grantor entered into possession. *Held*, that her coverture could be shown in rebuttal of the presumption of a grant from the cotenants of plaintiff's grantor, although not pleaded in connection with the statute of limitations or otherwise. *Ib.*

3. *Frauds, statute of. Parol sale. Renunciation.*

The action of the vendor's heirs in bringing ejectment for the land is a sufficient renunciation of a parol voidable sale thereof. *Daniel v. Coal & Iron Co.*, 501.

4. *Adverse possession. Possession by third person. Sufficiency of evidence.*

Evidence in ejectment, wherein defendant company claimed title by adverse possession, *held* not to show that the possession of a third person was held and claimed as a possession for defendant for a sufficient length of time to vest title in defendant. *Ib.*

ELECTIONS—ESTOPPEL.

ELECTIONS.

Officers. Eligibility. Constitutional and statutory provisions. Defaulter.

Under the express provisions of Const., art. 2, sec. 25, and Sannon's Code, sec. 1069, the election of a defaulter in the payment of State revenue to the office of clerk of the county board of road commissioners was absolutely void. *Hogan v. Hamilton Co.*, 554.

EMBLEMENTS.

Life estate. Right to.

Where a life tenant, having leased the premises, died, and the remainderman did not recognize the lease, the lessee of the life tenant was entitled to the emblements, which are the crops of grain growing yearly, but requiring an outlay of labor or industry, without payment of any compensation for use of the land in harvesting the emblements (citing Words and Phrases, First and Second Series, Emblements). *Turner v. Turner*, 592.

EQUITY.

Jurisdiction. Lands in another State.

An equity court has no jurisdiction to entertain a suit to try title to or to recover possession of land, or to enjoin a threatened trespass, where the land is situated in another State, so that, to enforce its decree, the process of the court would have to act upon the property, since such actions are local, not transitory, while equity acts *in personam*, not *in rem*. *Anderson-Tully Co. v. Thompson*, 80.

ESTOPPEL.

1. *Corporations. Corporate existence. Estoppel to deny.*

Where a note was made payable to the Ingle System Company, and there was nothing else to show the nature of the company, the payee is estopped to deny the company's corporate existence, for it may be assumed that such company was a corporation; the name not being particularly applicable to a firm. *Ingle System Co. v. Norris & Hall*, 472.

2. *Elements. Recitals of will. Ejectment.*

A recital in a will that testator owns no lands in the State will not estop his heirs from asserting title to lands as having belonged to him, where defendant has in no way acted on such recitals. *Daniel v. Coal & Iron Co.*, 501.

EVIDENCE.

EVIDENCE.

1. *Trial. Direction of verdict.*

In passing on a motion for a peremptory instruction, the court must take the most favorable view of the evidence appearing from the record, supporting the rights asserted by the party against whom the motion is made. *Railroad v. Morgan*, 1.

2. *Trial. Taking case from jury. Question of law or fact. Conflicting.*

There can be no constitutional exercise of the power to direct a verdict in any case where there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried, but the case must go to the jury; but, if there is no such dispute, the question is one of law for the court. *Ib.*

3. *Railroads. Accident at crossing. Question for jury.*

In an action for the death of the husband of one of the plaintiffs and for personal injuries to the other plaintiffs, when their buggy was struck by defendants engine, *held*, on the evidence, that whether defendants trainmen were negligent in not keeping a lookout, and whether the engineer, after plaintiffs' peril had been discovered, took the right precautions against injury, were for the jury. *Ib.*

4. *Witnesses. Corroboration. Previous consistent statements.*

In a prosecution for murder, where the State made no effort to impeach, by evidence of former contradictory statements, the testimony of defendant's sister that she had been delayed in keeping an appointment with her lover on account of the return of defendant to the house at a certain hour, which tended to establish an alibi, testimony of the lover himself as to what explanation the sister gave him of her lateness was properly excluded, since proof of prior consistent statement to corroborate a witness is inadmissible, unless the witness is impeached. *Dietzel v. State*, 47.

5. *Adverse possession. Possession by third person. Sufficiency of.*

Evidence in ejectment, wherein defendant company claimed title by adverse possession, *held* not to show that the possession of a third person was held and claimed as a possession for defendant for a sufficient length of time to vest title in defendant. *Daniel v. Coal & Iron Co.*, 501.

6. *Food. Deleterious beverage.*

In an action for damages for an illness caused by swallowing a decomposed mouse in a bottle of Coca-Cola purchased from a

EXECUTORS AND ADMINISTRATORS.

EVIDENCE—Continued.

local dealer to whom it had been sold by a bottling company, evidence *held* to sustain a finding that the bottling company was not at fault. *Crigger v. Bottling Co.*, 545.

7. *Vendor and purchaser. Actions for deficiency.*

Evidence *held* to show that complainants purchased a farm by the acre and not in gross, and so could recover for deficiency in acreage. *Caughron v. Stinespring*, 636.

8. *Rape. Admissibility.*

In a prosecution for rape, evidence of prior intercourse between prosecutrix and accused is admissible to raise an implication of consent. *Lee v. State*, 655.

EXECUTORS AND ADMINISTRATORS.

1. *Sales. Petition for sale.*

Under Shannon's Code, sec. 4000, providing that where an administrator has exhausted the personal estate in the payment of debts, leaving just debts unpaid or paid by the representative out of his own means, land belonging to deceased may be sold to satisfy such debts, and section 4001, providing that before decreeing such sale it shall appear that the personal estate has been exhausted in the payment of *bona fide* debt, and that the debts for which the sale is sought are justly due and owing, either to creditors or the representative, an administrator's petition for such a sale is not insufficient to give jurisdiction, where it alleges the total amount of indebtedness, although it does not name the creditors, nor set forth the nature and amount of each. *Puckett v. Wynns*, 513.

2. *Sales. Preliminaries.*

Failure to make a report to the clerk of the court of an administrator's sale to pay debt did not invalidate the sale, since it must be assumed that the court had necessary proofs to establish the facts set forth in the decree of sale. *Ib.*

3. *Sales. Preliminaries.*

That the administrator, petitioning for leave to sell land to pay debts, made no inventory of the estate and no publication for creditors, none of whom were joined, did not invalidate the decree, since such matter were not essential thereto. *Ib.*

EXTORTION—FRAUD.

EXTORTION.

Official fees. Penalties.

Under Shannon's Code, secs. 6352, 6353, prohibiting officers from demanding or receiving fees other than expressly provided by law, and declaring that, if an officer demands or receives any other or higher fee than prescribed, he shall be liable for a penalty, an officer who receives a fee to which he is not entitled is liable to a penalty, though the fee was voluntarily paid; this being particularly true in view of section 6714, governing extortion, which makes guilt depend upon the demanding and receiving of a greater fee than is allowed. *Marr v. Murphy*, 460.

FEDERAL EMPLOYERS' LIABILITY ACT.

See LIABILITY.

FEES.

See EXTORTION.

FOODS.

See POISONS.

FRAUD.

1. *Bills and notes. Pleading. Amendment. Allowance.*

In a bank's suit on a note defended on the ground of want of consideration, as it originated in fraud practiced by the bank's cashier upon the defendant maker, where the affidavit for the filing of an amended answer, differing from the original answer merely in the evidentiary facts stated as proof of want of consideration, justified the mistake in the original answer on the ground that counsel representing the defendant, a nonresident, had acted on certain memoranda found among the papers of defendant's first attorney, who had died, such affidavit was a sufficient reason for the allowance of the amendment. *Trust Co. v. McDougald*, 323.

2. *Pleading. Requisites. Formal words.*

Rev. St. Me. 1903, ch. 47 sec. 50. provides that stock may be issued in payment for services, and, in the absence of fraud, the judgment of the directors shall be conclusive as to the value of such services. *Held*, that a bill charging the issuance of stock to defendant to be without consideration sufficiently impeaches the consideration as fraudulent, although the word "fraud" is not used. *Sullivan v. Farnsworth*, 691.

GUARDIAN AND WARD—HUSBAND AND WIFE.

GUARDIAN AND WARD.

See SPECIAL COMMISSIONERS

HOMICIDE.

1. *Intent. Unlawful act. Negligence. Presumption.*

Where defendant, while driving an automobile in excess of twenty miles per hour, in violation of Pub. Acts 1905, ch. 173, killed a child who ran out in front of the automobile, he was guilty of felonious homicide, since he was negligent in violating the statute. *Lauterbach v. State*, 603.

2. *Intent. Unlawful act. Presumption.*

One who, while violating the law by speeding an auto, kills another is not relieved by the fact that the other ran in front of the auto, since he is presumed to anticipate the possibility of any result of his recklessness. *Ib.*

HUSBAND AND WIFE.

1. *Curtesy. Wife's separate estate. Devise.*

In the Married Woman's Act (Acts 1869-70, ch. 99), section 3 of which provided that married women owning a separate estate should have the power to dispose thereof by deed or will the same as single women, and section 6 of which provided that the act, except section 3, should embrace only such married women as were living apart from their husbands or whose husbands were insane, provided all married women owning any land of any sort or description should have full power to dispose thereof by will as fully as if they were single, but such testamentary disposition should not be construed to defeat any husband's tenancy by curtesy therein, the exception of separate estates from the first part of section 6 does not apply to the latter part of the section, concerning wills, and the husband takes a life estate by curtesy in the separate estate of his wife, the settlement of which did not exclude his curtesy and which was devised to her by others. *Larkin v. Lightburne*. 277.

2. *Constitutional law. Rights of husband. Statutory provisions.*

Acts 1913, ch. 26, abrogating all common-law disabilities of married women, and providing that every woman, now married or hereafter to be married, shall have the same capacity to acquire, enjoy, and dispose of all property and to make any contract in reference thereto as if she were not married, is

IMPEACHMENT—INDICTMENT.

HUSBAND AND WIFE—Continued.

not invalid as destroying any vested rights of a husband in a marriage occurring prior to the passage of the act, and his wife may recover the rent of land purchased by her prior to the marriage. *Parlow v. Turner*, 339.

3. *Action by married woman. Parties. Joinder of husband.*

In a married woman's action for injuries received in an automobile accident, which occurred after the passage of Married Women's Act, February 20, 1913 (Acts 1913, ch. 26), by which married women are given the right to sue in their own names, the joinder of the husband as a party plaintiff was unnecessary. *Knoxville Ry. & Light Co. v. Vangilder*, 487.

4. *Rights of husband. Services of wife.*

The Married Women's Act (Laws 1913, ch. 26), which relieved married women from all disability on account of coverture, did not affect a wife's marital duties, and a husband, as at common law, may recover for loss of the services of his wife by reason of personal injuries sustained by her. *City of Chattanooga v. Carter*, 609.

IMPEACHMENT.

Statutes. Legislative journals. Conclusiveness.

Journals of the legislature cannot be impeached even for fraud or mistake, but any errors therein can be corrected only by the legislature. *Heiskell v. Knox County*, 180.

INDICTMENT.

1. *Information. Names of witnesses. Indorsement. Statute.*

Under Shannon's Code, sec. 7054, requiring the foreman of the grand jury to indorse on the indictment the names of witnesses sworn by him, but that the omission to indorse shall in no case invalidate the indictment if the witnesses were actually sworn according to law, where the plea in abatement, to an indictment for murder, for failure to indorse thereon the names of witnesses examined by the grand jury, disclosed that the witnesses were sworn in fact, the indictment was not invalid. *Dietzel v. State*, 47.

2. *Criminal law. Plea in abatement. Late filing.*

Where an indictment for murder in the first degree was returned September 9th, and the court remained in session from day to day until September 21st, when a plea in abatement to such

INHERITANCE—INJUNCTION.

INDICTMENT—Continued.

indictment set up that names of witnesses before the grand jury were not indorsed thereon as required by statute, the plea came too late, since such pleas are not favored and must be filed at the first opportunity. *Dietzel v. State*, 47.

INHERITANCE.

1. *Slaves. Legitimation. Direct and collateral inheritance.*

Under Acts 1865-66, ch. 40, secs. 1, 2, giving to all negroes and their descendants having any African blood the right to inherit, and section 5, limiting the right of inheritance by children of former slaves to property acquired by their parents, the right of inheritance does not extend beyond direct inheritance from the parents, and does not include the right of collateral inheritance, and this declared policy of the State the courts, on the ground of comity alone, will not vary, so as to allow a collateral inheritance between children of a legitimized slave marriage coming from other States which it does not allow to native former slaves; so that a woman born in slavery under a slave marriage, who, with her brother, was legitimized by the law of another State, could not inherit from her deceased brother. *Cole v. Taylor*, 92.

2. *Slaves. Legitimation. Status.*

The status of legitimacy of the children of slave marriages fixed by the laws of one jurisdiction follows the person, and should be sustained in every State to which he may go, though the rule must yield to the policy of the State of adoption so far as inheritance is concerned. *Ib.*

3. *Marriage. Slaves. Effect.*

Since slaves could not contract, they could not enter into a valid marriage, and from their unions no civil rights could spring, so that the issue were incapable of inheriting property, the marriage being a mere cohabitation, subject to termination at the will of the master. *Napier v. Church*, 111.

4. *Slaves. Issue of slave marriage. Statutory right to inherit.*

The right of any issue of a slave marriage to inherit depends solely upon statute, since before emancipation no right of inheritance could flow from such a union. *Ib.*

INJUNCTION.

Criminal proceedings.

Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute exercising the State's police power in

INSTRUCTIONS.

INJUNCTION—Continued.

a matter as to which the legislature has complete jurisdiction, though it be charged that the statute is invalid, that a multiplicity of actions thereunder will injure and destroy civil and property rights of complainant, and that the damages resulting will be irreparable, when complainant's defense in a court having jurisdiction of the offense is adequate and unembarrassed. *Alexander v. Elkins*, 663.

See OUSTER.

INSTRUCTIONS.

1. *Railroads. Accident at crossing. Negligence.*

"An instruction that the situation of the locality as to obscuring the view of plaintiffs in the buggy or the trainmen on the engine, not caused by the default of either, was not the basis for a recovery or for liability, but that such situation and the rate of speed and the nearness of the engine to a train ahead of it were all to be considered in determining whether the statutory requirements had been complied with, and, if not, whether such failure was due to plaintiffs' sudden appearance on the track, so that defendant's servants had no time to comply therewith, was proper. *Railroad v. Morgan*, 1.

2. *Railroads. Accident at crossing. Contributory negligence.*

An instruction that it was the duty of one crossing a railroad track to be mindful of trains and to look and listen, and, if necessary, stop, and to exercise that care and caution which a reasonably prudent person would exercise, under similar circumstances, to protect himself, was proper. *Ib.*

3. *Trial. Emphasizing particular facts.*

Where the defendant's requests were so worded that they might have caused the jury to overlook its duty as to so sounding the whistle, if that could be done, the qualification of such instructions, so as to prevent the jury from overlooking such duty, if, under the circumstances, that was the best thing to do, and if the engineer had time to do so, was not objectionable as putting an undue emphasis on that feature of the case. *Ib.*

4. *Trial. Infringement of jury trial. Withdrawal of evidence from jury.. "Will." "Must." "Shall."*

Where the jury believe that a witness has sworn falsely and corruptly in one material respect, they may disregard the evidence altogether, except in so far as it is corroborated by other

INSURANCE.

INSTRUCTIONS—Continued.

credible evidence; but an instruction that “you ‘will’ reject his testimony altogether” was equivalent to “shall” or “must” and erroneous as withdrawing from the jury all the evidence which they might deem of the character indicated and denying the parties the constitutional right of trial by jury. *Railroad v. Morgan*, 1.

5. *Appeal and error. Harmless error.*

Such error was not harmless, within chapter 32 of the Acts of 1911, providing that no verdict shall be set aside or new trial granted for error in the charge or any error, unless it affirmatively appears that it has affected the result of the trial. *Id*

6. *Criminal law. Circumstantial evidence. Degree of proof.*

In a prosecution for murder, where the court charged that, if certain facts were found to be true beyond a reasonable doubt, then defendant was guilty of murder in the first degree, followed by an instruction that, where circumstances alone are relied upon to convict, the proof must be so cogent, powerful, and well connected as to satisfy beyond a reasonable doubt of defendant's guilt, and to exclude every other reasonable hypothesis, such instructions, taken together, were correct upon the point of the degree of certainty of proof required for conviction. *Dietzel v. State*, 47.

7. *Railroads. Accident at crossing.*

In an action for personal injury at a crossing brought under Shannon's Code, sec. 1574, subsec. 4, an instruction that it was the duty of the railroad on seeing plaintiff's wagon on or near the track, and in view of the train's speed of fifty miles an hour, to sound the whistle and endeavor to prevent an accident, was proper; but an instruction that plaintiff was entitled to recover because the engineer made no effort to stop even though no collision occurred was improper. *Whittaker v. Railroad*, 576

INSURANCE.

1. *Mutual benefit insurance. Forfeiture. Residence in prohibited territory. “Residing.”*

The constitution of a fraternal society by which a member agreed in his application to be bound provided that no benefit certificate should be granted to any one residing outside that part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and that, if a member should remove from such territory, he should

INSURANCE.

INSURANCE—Continued.

forfeit all right to any disability or death benefit. A member who had long resided in Memphis, where his wife and children continuously resided, was in Panama from October to December, 1908, and again from February to June, 1910, returning to his home in Memphis at the expiration of each of such periods. *Held* that, construing the constitution strictly against the insurer, and construing the provisions with regard to residence in, and removal from, the specified territory *in pari materia*, the policy was not forfeited by the member's temporary sojourn in Panama; as the word "residing" referred to the member's domicile, and implied a legal residence, and not a mere transitory existence in the prohibited territory, and the prohibited removal referred, not to a mere removal of the member's person, but to a removal of his residence. *Laue v. Grand Fraternity*, 235.

2. *Construction of contract. Construing against insurer.*

Where words are so used in a contract of insurance that their meaning is ambiguous or susceptible of two interpretations differing in import, that interpretation which will sustain the claim of the policy holder and cover the loss should be adopted. *Ib.*

3. *Mutual benefit insurance. Suspension or expulsion.*

The constitution of a fraternal society provided that the fraternity should be composed of a supreme governing council, and a board of directors, etc., and that the governing council should have power to try any member and expel or otherwise punish him. The by-laws made all the death and disability payments expressly subject to an agreement not to remove from the part of the North American continent between the northern boundary of Mexico and the fifty-fifth parallel of north latitude, and authorized the directors to cancel any benefit certificate for the breach of such covenant. *Held*, that neither the president of the fraternity nor its grand secretary had any authority to suspend a member or discontinue the acceptance of his dues because of his removal from the specified territory, and a letter written a local lodge by the secretary instructing it not to receive his dues did not suspend him. *Ib.*

4. *Mutual benefit insurance. Suspension or expulsion. Tender of dues.*

Where a fraternal society wrongfully declared a benefit certificate forfeited, and refused to accept dues thereunder, the ten-

INTOXICATING LIQUORS—JUDGMENTS, DECREES.

INSURANCE—Continued.

der of such dues as they became due until the death of the member kept his rights alive. *Laue v. Grand Fraternity*, 235.

5. *Mutual benefit insurance. Amount of recovery. Deducting unpaid dues.*

Where a fraternal society wrongfully declared a benefit certificate forfeited and refused to accept dues thereunder, but it was kept alive by the tender of dues, the amount of the dues which the society should have received should be deducted from the amount recoverable under the certificate. *Ib.*

6. *Construction of policy.*

Though an insurance contract prepared by the company, when doubtful or ambiguous in its terms, will always be construed in favor of the insured, it should be construed, like other contracts, so as to give effect to the intention and express language of the parties. *Seay v. Life Ins. Co.*, 673.

INTOXICATING LIQUORS.

Criminal offenses. Place of sale.

Acts 1899, ch. 161, provides that any person selling intoxicating liquors without a license shall be guilty of a misdemeanor. Shannon's Code, sec. 6783, provides that the article as to selling liquors is to be construed liberally to prevent evasions and effectuate the objects had in view. *Held*, that where a person went upon a steamboat on the Mississippi river for the purpose of purchasing, and was received on the boat by those operating it for the purpose of selling him, intoxicating liquors, and the boat thereupon ran into the river across the State line, and after a sale of liquor was made by its barkeeper looped back to the Tennessee shore and landed the purchaser near the point from which he started, the barkeeper was guilty of a violation of the statute. *Kinnane v. State*, 331.

JUDGMENTS AND DECREES.

1. *Appeal and error. Remand. Order of remand.*

Where the only question at issue was the measure of damages, the appellant court, on reversal of a judgment for plaintiff, will qualify the order of remand so as to determine only the matter of damages. *Perkins v. Brown*, 294.

2. *Infants. Collateral attack. Judgments impeachable.*

Where the court has jurisdiction of the parties and the subject-matter of litigation upon pleadings putting in issue the matter

JUDICIAL NOTICE.

JUDGMENTS AND DECREES—Continued.

adjudicated, the decree cannot be attacked collaterally, and is binding upon minors as well as adults. *Puckett v. Wynns*, 513.

3. *Collateral attack. Grounds.*

Upon collateral attack upon a judgment or decree of a court of general jurisdiction by parties or privies thereof, such judgment or decree cannot be questioned, except for want of authority over the matter adjudicated, which want of authority must appear from the record itself. *Ib.*

4. *Collateral attack. Presumption of jurisdiction.*

On collateral attack on a judgment or decree, it is conclusively presumed, in the absence of a contrary showing on the record, that the court had power to determine the question involved, and the evidence on which the court acted cannot be considered. *Ib.*

5. *Executors and administrators. Sales. Preliminaries.*

That the administrator, petitioning for leave to sell land to pay debts, made no inventory of the estate and no publication for creditors, none of whom were joined, did not invalidate the decree, since such matters were not essential thereto. *Ib.*

6. *Criminal law. New trial. Discretion of court. Harmless error.*

Under Pub. Acts 1911, ch. 32, providing that no judgment shall be set aside nor new trial granted for error, unless in the opinion of the appellate court it affected the result of the trial, new trial will not be granted where, in spite of the error, the judgment is sustained by the evidence. *Lauterbach v. State*, 603.

JUDICIAL NOTICE.

1. *Evidence. Legislative journals.*

Judicial notice of house and senate journals will be taken, not only before they are printed, but on demurrer to a bill alleging a statute was not passed conformably to the constitution. *Todtenhausen v. Knox County*, 169.

2. *Evidence. Legislative journals.*

The court takes judicial notice of the journals of the legislature, showing the steps taken in the enactment of statutes. *Heiskell v. Knox County*, 180.

3. *Pleading. Demurrer.*

Judicial notice of legislative journals, showing the proper enactment of a statute, may be taken on demurrer to a bill, charging

JURIES AND JURORS—JURISDICTION.

JUDICIAL NOTICE—Continued.

that a statute was not regularly enacted; a demurrer not admitting allegations contrary to facts judicially known to the court. *Heiskell v. Knox County*, 169.

4. *Evidence. Legislative journals.*

Judicial notice will be taken of journals of the legislature before they are published. *Ib.*

JURIES AND JURORS.

1. *Separation. Effect.*

Notwithstanding accused consented to a separation of the jury, a conviction of felony by such jury cannot be upheld; Const., art. 1, sec. 9, providing that in all criminal cases accused shall be entitled to a speedy public trial by an impartial jury, precluding separation of the jury in criminal prosecutions for felony or where the death penalty may be assessed. *Long v. State*, 649.

2. *Criminal law. Trial. Custody of jury.*

In a capital case, it is improper and constitutes reversible error to permit the jury to go at large pending the trial, even though accused consent; this depriving him of his constitutional guarantees of fair and impartial trial by jury. *Lee v. State*, 655.

JURISDICTION.

1. *Equity. Jurisdiction. Lands in another State.*

An equity court has no jurisdiction to entertain a suit to try title to or to recover possession of land, or to enjoin a threatened trespass, where the land is situated in another State, so that, to enforce its decree, the process of the court would have to act upon the property, since such actions are local, not transitory, while equity acts *in personam*, not *in rem*. *Anderson-Tully Co. v. Thompson*, 80.

2. *Equity. Jurisdiction of person. Enforcement of contract concerning foreign lands.*

Where plaintiffs, by contract with the defendants, had the right to remove timber from certain lands in another State, a court of equity, having jurisdiction of the persons of defendants, could restrain them, from unlawfully interfering with the plaintiffs in removing the timber under the contract, although the rights involved grew out of such real estate, since the only action required of defendants, to afford the plaintiffs a complete

JURISDICTION.

JURISDICTION—Continued.

remedy, was merely to refrain from unlawfully and fraudulently interfering by themselves or servants. *Ib.*

3. *Courts. Appellate jurisdiction. Tennessee supreme court.*

In view of Acts 1907, ch. 82, creating the court of civil appeals, with appellate jurisdiction of all civil cases coming up from the law and equity courts, except cases involving constitutional questions or chancery cases involving more than \$1,000, etc., an incidental prayer for the recovery of a money judgment in excess of \$1,000 will not confer appellate jurisdiction upon the supreme court, when the main purpose of the suit is to obtain some relief other than a money judgment; and the value of property involved is immaterial in determining jurisdiction, except in those cases wherein a direct money decree is sought as the end or purpose of the litigation. *Burns v. City of Nashville*, 429.

4. *Courts. Appellate jurisdiction. Tennessee supreme court. Statutes.*

Acts 1907, ch. 82, creates the court of civil appeals, with appellate jurisdiction of all civil cases coming up from the law and equity courts, except cases involving constitutional questions or chancery cases involving more than \$1,000, etc. A taxpayers' bill in chancery against the city of Nashville, its commissioners, and the city treasurer, officially and individually, and against the surety on their bonds, charged, among other unlawful acts, wasteful and dishonest management of the city's financial affairs, sought to restrain the commissioners from exercising certain functions of their offices and from making further contracts for the city, or from paying out any of its funds, prayed that a receiver be appointed to take charge of the finances and property of the city, and asked a reference to determine what amount of the city's money had been misappropriated, and a decree therefor against such officers and their surety, and, as amended, alleged that the commissioners had unlawfully expended \$14,000 for the erection of a new market house, and asked judgment against them for that sum, and made certain contractors, banks, etc., parties defendant, charged with unlawful participation in the misappropriation of the city's funds, and sought a decree against them. The chancellor's interlocutory orders restraining the commissioners in the expenditure of the city funds and appointing a receiver for the city, on petitions for *certiorari* and *supersedeas*, were superseded by the pre-

JURISDICTION.

JURISDICTION—Continued.

siding judge of the court of civil appeals. *Held*, that *certiorari* to annul the order of the court of civil appeals on the ground of its want of jurisdiction would be denied, as the supreme court could not say that any judgment for any sum of money would be rendered against any party on the final hearing, and could not foretell to which court an appeal would lie after the final decree. *Burns v. City of Nashville*, 429.

5. *Courts. Appellate jurisdiction. Test.*

Jurisdiction on appeal is to be tested by the matter in controversy on appeal, and not by the matters which may have been involved in the lower court. *Ib.*

6. *Courts. Court of civil appeals. Ouster suits.*

Acts 1907, ch. 82, sec. 7, gives the court of civil appeals appellate jurisdiction of cases brought up from equity or chancery courts, with certain exceptions, and cases tried in the circuit and common-law courts in which writs of error or appeals in the nature of writs of error are applied for, and provides that in cases in which appellate jurisdiction is not conferred upon such court appeals shall be direct to the supreme court, and writs of error, *certiorari*, and *supersedeas* shall be issued by that court. Ouster Acts (Acts 1915, ch. 11), sec. 9, gives the supreme court appellate jurisdiction where a final judgment or decree has been rendered in causes instituted under that act. *Held*, that the Act of 1915 ingrafts on the Act of 1907 an additional exception, and places ouster proceedings in the class of cases of which the supreme court is given exclusive jurisdiction, and hence the court of civil appeals and its judges are without jurisdiction to hear and determine an appeal, or an appeal in the nature of a writ of error, or to issue writs of *certiorari* and *supersedeas*, or adjudicate the right of a party to such a writ in a suit under the Act of 1915. *State ex rel. v. Alexander*, 439.

7. *Certiorari. Want of excess of jurisdiction. Statutory provisions.*

Under Shannon's Code, sec. 4853, providing that the writ of *certiorari* may be granted where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when in the judgment of the court there is no other plain, speedy, or adequate remedy, it is the duty of the supreme court to grant the writ of *certiorari* and *supersedeas* when orders of the court of civil appeals and

JURISDICTION.

JURISDICTION—Continued.

its judges and of the circuit court are beyond the jurisdiction of those courts. *Ib.*

8. *Courts. Supreme court. Ouster suits.*

Acts 1907, ch. 82, sec. 7, provides that, in cases in which appellate jurisdiction is not conferred on the court of civil appeals, appeals shall be direct to the supreme court, and writs of error, *certiorari*, and *supersedeas* shall be issued by, and made returnable to, that court, and such court shall have exclusive jurisdiction, and shall try and finally determine all such cases. Ouster Act (Acts 1915, ch. 11), secs. 9, 13, provide that appeals in proceedings instituted thereunder shall lie to the supreme court, where final judgment shall be rendered. *Held*, that the supreme court, and not the court of civil appeals, has jurisdiction to issue writs of *certiorari* and *supersedeas* to review an order suspending a municipal officer from office pending an ouster proceeding, since, when appeals lie to the supreme court, the power to revise, regulate, or review orders, judgments, and decrees by *certiorari* or *supersedeas* is also with that court. *State ex rel. v. Howse*, 452.

9. *Executors and administrators. Sale of land. County court.*

Under Shannon's Code, secs. 6028, 6071, 6112, conferring concurrent jurisdiction upon the chancery, circuit, and county courts to sell real estate of decedents and for distribution or partition, the county court has concurrent jurisdiction with the circuit and chancery courts of a proceeding to sell a decedent's real estate for the payment of debts due to creditors or to the representative. *Puckett v. Wynns*, 513.

10. *Infants. Judgment. Collateral attack. Judgments impeachable.*

Where the court has jurisdiction of the parties and the subject-matter of litigation upon pleadings putting in issue the matter adjudicated, the decree cannot be attacked collaterally, and is binding upon minors as well as adults. *Ib.*

11. *Judgment. Collateral attack. Grounds.*

Upon collateral attack upon a judgment or decree of a court of general jurisdiction by parties or privies thereof, such judgment or decree cannot be questioned, except for want of authority over the matter adjudicated, which want of authority must appear from the record itself. *Ib.*

12. *Elections. Contest. Chancery.*

The Chancery Court has no jurisdiction of a bill brought to contest the election of the one receiving the highest number of

LANDS AND LAND TITLES.

JURISDICTION—Continued.

votes, on the ground of his ineligibility, or to declare the election void. *Hogan v. Hamilton Co.*, 554.

See OUSTER.

LANDS AND LAND TITLES.

1. *Adverse possession. Character of possession. Notoriety.*

Where the store owner paved the lot first with brick, and then with granolithic paving, and maintained such pavement during the statutory period, his possession thereof was open and notorious and gives him title. *Bensdorff v. Uihlein*, 193.

2. *Tenancy in common. Adverse possession. Presumption of grant.*

A presumption of title may arise by an exclusive and uninterrupted possession by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part, but such presumption arises independent of the statute of limitations, and may be rebutted by proof of disability on the part of the cotenants. *Drewery v. Nelms*, 254.

3. *Public lands. Transfer of land grant. Registration. Presumption.*

Where a copy of what appeared to be a registration of an original land grant was introduced in evidence in ejectment, and immediately following it appeared a transfer executed by the grantee of the land therein described, the position of the transfer on the registration book following the grant indicated that it was a transfer of the land written on the back of the original grant. *Daniel v. Coal & Iron Co.*, 501.

4. *Public lands. Registration. Transfer of land grant.*

Where the custom then in force required that grants of land from the State be recorded by the register of the land office before delivery to the grantees, a grant had necessarily been recorded prior to January 23, 1833, when a transfer thereof was indorsed on the back of the grant; and hence a notation appearing on the record, reading "Registered December 24, 1834," necessarily referred to the registration of the transfer, rather than of the grant. *Ib.*

5. *Estoppel. Elements. Recitals of will. Ejectment.*

A recital in a will that testator owns no lands in the State will not estop his heirs from asserting title to lands as having be-

LAWS 1899—LEGISLATIVE AUTHORITY.

LANDS AND LAND TITLES—Continued.

longed to him, where defendant has in no way acted on such recitals. *Ib.*

6. *Ejectment. Right of action. Parties. Power of sale.*

A provision of a will authorizing testator's executors to sell and convey his realty, being but a power of sale, did not vest title in his executors, so as to preclude his heirs from suing to recover the land. *Ib.*

7. *Adverse possession. Use and occupation. Inclosure.*

Title in defendant by adverse possession could not be predicated on a possession within the boundary of a tract of land owned by defendant and interlapping the land in controversy, where defendant's inclosure was not within the interlap. *Ib.*

8. *Vendor and purchaser. Deficiency. Statements in deed.*

To recover for misrepresentation as to the quantity of land conveyed, it is not necessary that the acreage be stated in a deed, but this may be shown by extrinsic evidence. *Caughron v. Stinespring*, 636.

See POSSESSION.

LAWS 1899.

Bills and notes. Consideration. Antecedent debt. *Trust Co. v. McDougald*, 323.

· LEASES.

Life estates. Leases by life tenant. Disaffirmance by remainderman.

Where, after the death of a life tenant, the remainderman sought to recover possession of the land and compensation from lessees for use, there was no ratification of the lease within Shannon's Code, sec. 4184, authorizing an apportionment of rent. *Turner v. Turner*, 592.

LEGISLATIVE AUTHORITY.

Constitutional law. Judicial functions. Political questions.

Whether nonresident merchants should be allowed to compete for local trade by employing solicitors without paying a merchant's license fee is a political question for the legislature, with which the courts have no concern. *Lowenthal v. Underdown*, 559.

LEGITIMATION.

LEGITIMATION.

1. *Slaves. Status.*

The status of legitimacy of the children of slave marriages fixed by the laws of one jurisdiction follows the person, and should be sustained in every State to which he may go, though the rule must yield to the policy of the State of adoption so far as inheritance is concerned. *Cole v. Taylor*, 92.

2. *Slaves. Slave marriage. Validation. Louisiana law. Statute.*

Under act of 1868 of the State of Louisiana (Act No. 210 of 1868), providing for the validation of slave marriages, such a validation might be effected by a declaration of marriage before a notary public, while the courts of that State adopted another rule that such marriages might be validated by mere cohabitation as man and wife after emancipation, although there is no decision that a mere meeting of the parties thereafter, without resuming the relationship of marriage, effects a validation. *Napier v. Church*, 111.

3. *Slaves. Slave marriage. Validation under foreign law. Comity. Certainty of law.*

Where it is urged that the issue of a slave marriage is legitimate, on account of the validation of the marriage under the laws of a foreign State, to enable such issue to inherit property here, there must be some clear and convincing law of the foreign State, either by statute or court decision, to warrant the court in declaring legitimacy. *Ib.*

4. *Slaves. Validity of slave marriage. Statute.*

Under Acts 1865-66, ch. 40, providing that persons of color have the right to make and enforce contracts, sue and be sued, be parties and give evidence, to inherit, and to have the benefit of all laws and proceedings for the security of person and estate, and under Shannon's Code, sec. 4179, providing that all free persons of color who were living together as husband and wife in this State while in a state of slavery are man and wife, and their children legitimately entitled to an inheritance in any property of such parents to as full an extent as the children of white citizens, the issue of a slave marriage, contracted and terminated before emancipation in Louisiana, the parties to which never lived together in this State, was not legitimized to inherit from the father, a citizen here at the time of his death. *Ib.*

LIABILITY.

LEGITIMATION—Continued.

5. *Slaves. Slave marriage. Validation. Statutes. "Living together."*

Under Acts 1865-66, ch. 40, as amended by Acts 1887, ch. 151, Shannon's Code, sec. 4183, making the Code provision that all free persons of color living together in this State as husband and wife while in a state of slavery are man and wife, and their children legitimate and entitled to inherit, applicable to persons of color "living together" as man and wife in other States, who have moved to this State, the issue of a slave marriage, contracted and terminated previous to emancipation in the State of Louisiana, the parties never thereafter having moved to this State, was not legitimized to inherit from the father, dying a citizen of this State, where the father, who had been a body servant of a steamboat captain, had visited his slave wife in New Orleans only occasionally, when his master's boat was in port there, since the words "living together" imply a habitat or place of domicile, where both parties reside or have their home. *Ib.*

LIABILITY.

1. *Food. Poisonous substances. Liability of manufacturer to consumer.*

In an action for injuries from drinking a tonic containing a poisonous substance, the bottle containing same having been bought sealed from an intermediate dealer to whom the defendant manufacturer had sold it, want of contract or privity between defendant and the person injured constituted no defense; a person who undertakes to perform an act which, if not done with care and skill, will imperil the lives of others, being liable to others suffering from his negligence. *Boyd v. Bottling Works*, 23.

2. *Equity. Special commissioners. Loan. Noncompliance with order. Sureties.*

Where a special commissioner, in lending funds, failed to comply with the order to take two good sureties, and took but one, the fact that the principal and the one surety continued solvent until some months after the commissioner's settlement did not free him and his surety from liability on his bond on the ground that no harm had been done by his disobedience of the order; since, had he taken two sureties, the notes might have been collectible after the insolvency of the principal and the surety actually taken because of the solvency of the second surety. *State v. Fidelity & Deposit Co.*, 303.

LIABILITY.

LIABILITY—Continued.

3. *Equity. Liability of surety on bond. Effect of additional bond as commissioner.*

Shannon's Code, sec. 405, provides that the court may take an additional bond from the clerk and master to secure the performance of his duties as commissioner, and that the clerk and his sureties shall be liable upon his bond as clerk, in the absence of such special bond, for his defaults as commissioner. Upon the expiration of a clerk's term of office a new bond was taken securing the performance of his duties as commissioner, and, when the surety on his bond as clerk was sued for a default as commissioner, it contended that the bond as clerk was displaced by the bond as commissioner, and that it was not liable on the bond securing the performance of the clerk's duties as such for his default as commissioner, subsequent to the taking of the new bond. *Held*, that the bond to secure duties as clerk was not displaced, in so far as it secured the commissioner's duties, since a direct order of the court to displace a bond is necessary, while the taking of the additional bond authorized by the statute could not harm the surety, as it operated to make the liability of the surety on the bond of the clerk for his default as commissioner secondary to its extent. *State v. Fidelity & Deposit Co.*, 303.

4. *Food. Chewing tobacco. Impurities. Manufacturer's liability to consumer.*

Tobacco, even chewing tobacco, is not a foodstuff, within the exception of foodstuffs from the rule that ordinarily the manufacturer of an article placed by him on the market for sale, and sold by another, is not liable to the ultimate consumer for injuries from defects or impurities in it; "food" including only what tends to build bodily tissues. *Liggett & Myers Tobacco Co. v. Cannon*, 419.

5. *Negligence. Liability of manufacturer. Defective article.*

The manufacturer of chewing tobacco is not liable for injury to the ultimate consumer, a purchaser from a retailer, for injuries from a bug imbedded in a plug; it having no knowledge or notice of its presence and the consequent danger of using the tobacco. *Ib.*

6. *Extortion. Official fees. Penalties.*

Where a justice of the peace received a fee for issuing a criminal warrant before it was due, he is liable to the penalty provided by Shannon's Code, sec. 6353, for the receiving or demanding

LIABILITY.

LIABILITY—Continued.

of any other or higher fee than that prescribed; such fee not being prescribed. *Marr v. Murphy*, 460.

7. *Food. Sales. Injurious substances.*

One who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, or articles inherently dangerous is liable for breach of a duty to the public in the preparation thereof, regardless of the privity of contract to any one injured for a failure to properly safeguard and perform such duty. *Crigger v. Bottling Co.*, 545.

8. *Negligence. Owners of buildings. Duties to licensee. Police officer.*

A police officer, observing a door of the defendant company to be open, while the room was unoccupied, went into the store, and when coming out closed the door with such force as to cause a screen over the transom to fall, injuring his foot. *Held*, that his acts, though in the performance of his duty, were those of a licensee, and that he could not recover for the injury, since a property owner is liable to a licensee only for willful injury. *Adding Mach. Co. v. Fryar*, 612.

9. *Prisons. Liability of superintendent. Torts of assistant.*

The superintendent of a county workhouse, under Priv. Acts 1913, ch. 264, creating the office of road commissioners, and providing that one of them should be superintendent of the workhouse and employ its guards with the approval of his associates, was acting in an official or governmental capacity in employing a guard, and, where he was not present when the guard, whom he had told not to shoot any prisoner, shot and wounded a prisoner, attempting to escape, he was not liable in damages. *Lunsford v. Johnston*, 615.

10. *Insurance. Liability insurance. Construction. "While acting under assured's instructions."*

Defendant insured plaintiff, a physician having in his employ two younger doctors as assistants, against loss from liability for bodily injuries or death suffered in consequence of error, mistake, or malpractice by any assistant in his employ "while acting under the assured's instructions." One of his assistants made a mistaken diagnosis, resulting in a judgment for damages against the physician. The diagnosis and treatment was left wholly to the assistant, and the physician apparently had no

LICENSEE.

LIABILITY—Continued.

knowledge of the particular case and gave the patient no personal attention; the assistant merely acting according to previous general instructions and the custom which prevailed under the contract between himself and the physician. *Held*, that defendant was not liable, since the quoted words were intended to qualify defendant's liability, and if they were treated as covering the physician's general instructions, they would neither expand nor restrict the insurer's liability, but would be altogether meaningless. *Seay v. Life Ins. Co.*, 673.

11. *Death. Federal employers' liability act. Limitation. New action.*

Under the federal Employers' Liability Act (Act Cong. April 22, 1908, ch. 149, 35 Stat. 65 [U. S. Comp. St. 1913, secs. 8657-8665]), giving a right of action for the death of a railroad employee while engaged in interstate commerce, which may be brought in the State courts conditioned on suit being brought within two years from the day the cause of action accrued, the limitation of the remedy is necessarily a limitation of the right to sue at all, so that Shannon's Code, sec. 4446, providing that if an action is commenced within the time limited, and the judgment against plaintiff is rendered upon a ground not concluding his right of action, or the judgment for plaintiff is arrested or reversed, the plaintiff may commence a new action within one year, does not apply; and hence plaintiff, whose suit under the act, brought within two years, was terminated by a voluntary nonsuit, could not maintain a suit brought within one year from the termination of the former suit. *Vaught v. Railroad*, 679.

12. *Corporations. Stockholders. Subscription.*

Where defendant did not formally subscribe for stock in a corporation, but merely receipted for, accepted, and held the certificates, he was nevertheless liable for the unpaid balance of the stock. *Sullivan v. Farnsworth*, 691.

LICENSEE.

Negligence. Owners of buildings. Duties to licensee. Police officer.

A police officer, observing a door of the defendant company to be open, while the room was unoccupied, went into the store, and when coming out closed the door with such force as to cause a screen over the transom to fall, injuring his foot. *Held*, that his

LICENSES—MASTER AND SERVANT.

LICENSEE—Continued.

acts, though in the performance of his duty, were those of a licensee, and that he could not recover for the injury, since a property owner is liable to a licensee only for willful injury. *Adding Mach. Co. v. Fryar*, 612.

LICENSES.

Merchants. Persons liable. "Solicitor."

One who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money and delivering no goods, is a mere "solicitor," and not liable for a merchant's license fee. *Lowenthal v. Underdown*, 559.

LIMITATION OF ACTIONS.

See ACTION, RIGHT AND CAUSE.

MALICE.

Torts. Injury to business.

In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination. *Hutton v. Watters*, 527.

MARRIED WOMAN'S ACT.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Master's negligence. Violation of statute.*

A master's violation of the terms of a statute requiring structures to secure safety in mine shafts was negligence *per se*, and made him responsible for all injury suffered as a direct consequence thereof. *American Zinc Co. v. Graham*, 586.

2. *Liability for injuries. Conformity to customary usage.*

A defense conclusive in character is not made out by a showing on the part of an employer that, in respect to appliances or places of work furnished by him, he has conformed to the usage obtaining among employers of like character in the district,

MINES AND MINING—MUNICIPAL CORPORATIONS.

MASTER AND SERVANT—Continued.

and though proof of conformity to customary usage makes a prima-facie case of nonliability when nothing else appears, this case is subject to be rebutted by proof that the appliance where set for use, or the place of work, was one so inherently and flagrantly dangerous that it must have been obviously so to the employer. *Iron Works v. Moore*, 709.

See MINES AND MINING; ACTION, RIGHT AND CAUSE.

MINES AND MINING.

1. *Master and servant. Safe place to work. Statute.*

Laws 1903, ch. 237, sec. 28, requiring that the buckets used in mines shall be covered and that there shall be certain structures inside the shaft so as to make the ascent and descent of employees safe, applied to a mine not fully in operation, which had sunk a shaft more than 250 feet, from the foot of which ran a drift to an old shaft, intended as a means of conducting air into the mine, and which was used by the employees in going to and returning from their work. *American Zinc Co. v. Graham*, 586.

2. *Master and servant. Safe place to work. Statute. Contributory negligence.*

In such case a servant, knowing that the master had failed to comply with the statute requiring certain structures inside the shaft to make it safe for employees going up and down, did not assume the risk; and the fact that the statute fixed a penalty for its violation did not exclude his action for damages. *Ib.*

MOTIONS.

Trial. Direction of Verdict. Evidence.

In passing on a motion for a peremptory instruction, the court must take the most favorable view of the evidence appearing from the record, supporting the rights asserted by the party against whom the motion is made. *Railroad v. Morgan*, 1.

MUNICIPAL CORPORATIONS.

1. *Issue of bonds.*

Where the credit of a city is to be used for a proper city purpose, bonds may be issued, if due authority is given by the legislature, without a submission of the matter to a vote of the people. *Imboden v. City of Bristol*, 562.

NE EXEAT—NEGLIGENCE.

MUNICIPAL CORPORATIONS—Continued.

2. *Street improvements. Bonds.*

Const., art. 2, sec. 29, declares that the credit of no county, city, or town shall be given in aid of any person, association, or corporation except upon an election first held by the qualified voters. Priv. Acts 1913 (1st Ex. Sess.), ch. 18, authorized the city of Bristol to improve streets and issue bonds to pay for the improvement; the bonds to be the absolute and general obligations of the municipality. The act further provided for the payment of two-thirds of the cost by abutting property owners, and they were allowed five years to complete payments. *Held* that, though the abutting property owners received a peculiar benefit and were specially assessed for it, yet, the improvement of the streets being for the benefit of the city and its inhabitants, the issuance of bonds for payment of the entire work was not a pledge of the city's credit for the benefit of such abutting owners. *Ib.*

See OUSTER.

NE EXEAT.

1. *Issuance of writ. Right to.*

The writ of *ne exeat* will not issue for demands uncertain or contingent, and either the demand or its enforcement must be of an equitable nature. *Caughron v. Stinespring*, 636.

2. *Writ. Pleading.*

A bill, praying the issuance of a writ of *ne exeat*, must by positive allegations or by facts showing the intention, set forth defendants' intended departure from the State and the probability of loss of rights. *Ib.*

NEGLIGENCE.

1. *Food. Poisonous substances. Contributory negligence.*

A consumer was not negligent for failure to examine a bottle of tonic for poisonous substances, where it was sealed when bought from the dealer to whom the bottling works had sold it, especially where the bottle and the fluid were both dark in color, and the poisonous substance, a cigar stub, could not have been readily discerned. *Boyd v. Bottling Works*, 23.

2. *Highways. Automobile accident. Obstructions. Contributory negligence.*

A person who drove an automobile at night in a dark place on the highway so fast that he could not avoid an obstruction within

OFFICERS—OUSTER.

NEGLIGENCE—Continued.

the distance lighted by his lamps was guilty of contributory negligence, barring his recovery, though just before the accident the bright lights of an approaching automobile and a curve where his own light did not shine directly in the way the machine was going hindered him from seeing the obstruction. *Knoxville Ry. & Light Co. v. Vangilder*, 487.

3. *Imputed negligence. Automobile accident. Husband and wife.*

The negligence of the driver of an automobile, in consequence of which the machine ran into an obstruction negligently left at the roadside by defendant, was not imputable to his wife, who was riding with him, so as to bar her right to recover for her own injuries, where it did not appear that the danger was obvious or known to her, and that she did not rely on the assumption that her husband would exercise care and caution. *Ib.*

4. *Homicide. Defenses. Contributory negligence.*

One who, while violating a law, kills another is not relieved by the negligence of the other, for the doctrine of contributory negligence does not apply to criminal acts. *Lauterbach v. State*, 603.

OFFICERS.

1. *De facto officer. Rights.*

The fact that one whose election as clerk of a county board of road commissioners was absolutely void was permitted by the county court to take the oath and to give bond added nothing to his rights, and he merely became a *de facto* officer and could assert no rights. *Hogan v. Hamilton Co.*, 554.

2. *"De jure officer." Right to compensation.*

The clerk of a county board of road commissioners entitled to hold over under the constitution, after the void election of his intended successor, was the "*de jure* officer" entitled to serve and to receive the salary of the office. *Ib.*

OUSTER.

1. *Municipal corporations. Officers. Removal or suspension. Statutory provisions.*

Acts 1915, ch. 11, sec. 8, provides relative to ouster proceedings that, if defendant shall be found guilty, judgment of ouster shall be rendered against him and he shall be ousted from his office.

OUSTER.

OUSTER—Continued.

Section 10 authorizes the court to suspend accused officers from performing the duties of their office pending the final hearing and determination of the matter, but further provides that no person shall be suspended until at least five days' notice of the application for the order of suspension shall be served upon him, that such officer may appear and shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order of suspension, and that when an order of suspension is made the vacancy shall be filled as the law provides for the filling of vacancies in such office. *Held*, that an injunction restraining an officer sought to be ousted from exercising the functions of his office would accomplish the same result as his suspension, and, having been granted without the required notice and hearing, was unauthorized and beyond the power of the trial judge. *State ex rel. v. Alexander*, 439.

2. *Municipal corporations. Officers. Removal or suspension. Statutory provisions. "Full hearing."*

Ouster Act (Acts 1915, ch. 11), sec. 7, provides that ouster proceedings thereunder shall be summary and triable as equitable actions, regardless of the court in which they are brought. Section 10 authorizes the suspension of the officer sought to be ousted pending the determination of the proceeding, and provides that no person shall be suspended without five days' notice of the application for the order of suspension, and that he shall be entitled to a full hearing upon the charges contained in the complaint and upon the application for the order of suspension. *Held*, that the "full hearing" provided for is not a "final hearing," but means no more than that the chancellor or trial judge shall give ample opportunity to both sides to make a showing fairly adequate to make manifest the propriety or impropriety of the suspension. *State ex rel. v. Howse*, 452.

3. *Municipal corporations. Officers. Removal or suspension. Evidence.*

On an application to suspend a municipal officer pending an ouster proceeding against him under Acts 1915, ch. 11, the proof need not be adduced as is done on a formal trial on the merits, but may be introduced by affidavit or otherwise. *Ib.*

4. *Municipal corporations. Officers. Removal or suspension. Evidence.*

On an application to suspend a municipal officer pending an ouster proceeding against him under Acts 1915, ch. 11, the court did

PARTITION—PLEA IN ABATEMENT.

OUSTER—Continued.

not err in admitting in evidence the transcript of a proceeding pending in the chancery court of the same county, in which the accused officers were sought to be held liable for the same acts, in which transcript were incorporated the depositions of witnesses who had been cross-examined by their counsel. *State ex rel. v. Howse*, 452.

5. *Municipal corporations. Officers. Removal or suspension. Evidence.*

On an application to suspend a municipal officer pending an ouster proceeding against him, it was the duty of the court to hear the testimony of witnesses produced by such officer, providing their introduction was not carried to a point of manifesting a purpose to delay action on the application for the suspension. *Ib.*

6. *Municipal corporations. Officers. Removal or suspension. Nature of proceeding. "Civil proceeding."*

An ouster proceeding against a municipal officer, under Acts 1915, ch. 11, is primarily for the protection of the public, and not to punish the offender, and is civil rather than criminal in nature. *Ib.*

PARTITION.

Order of sale. Purchase by tenant in common. Validity.

Under Shannon's Code, sections 5010, 5025, 5040, 5042, 5051, 5052, 5915, authorizing partition and the settlement by decree of the rights of the parties, and providing that a confirmation of sale divests title, a tenant in common filing a petition to sell for partition may purchase the property at a sale ordered by the court, in the absence of any fraud. *Davis v. Solari*, 225.

PENALTIES.

See EXTORTION.

PLEA IN ABATEMENT.

Criminal law. Late filing.

Where an indictment for murder in the first degree was returned September 9th, and the court remained in session from day to day until September 21st, when a plea in abatement to such indictment set up that names of witnesses before the grand jury were not indorsed thereon as required by statute, the plea came too late, since such pleas are not favored and must be filed at the first opportunity. *Dietzel v. State*, 47.

PLEADING AND PRACTICE.

PLEADING AND PRACTICE.

1. *Food. Bottling of tonic. Negligence. Pleading and proof. Variance.*

In an action against a bottling company for injuries from drinking a tonic negligently placed in a bottle containing a cigar stub, there was no fatal variance between an allegation of the declaration that defendant negligently placed the cigar stub in the bottle, and the proof that it was placed in the bottle by some one else, and was there when the bottle was filled, where the real negligence charged in the declaration was the bottling of the cigar stub and placing of the bottle on the market. *Boyd v. Bottling Works*, 23.

2. *Equity. Jurisdiction of person. Enforcement of contract concerning foreign lands.*

Where plaintiffs, by contract with the defendants, had the right to remove timber from certain lands in another State, a court of equity, having jurisdiction of the persons of defendants, could restrain them, from unlawfully interfering with the plaintiffs in removing the timber under the contract, although the rights involved grew out of such real estate, since the only action required of defendants, to afford the plaintiffs a complete remedy, was merely to refrain from unlawfully and fraudulently interfering by themselves or servants. *Anderson-Tully Co. v. Thompson*, 80.

3. *Wills. Probate. Legitimacy of contestant.*

Where the proponent of a will, upon petition to contest as heir of decent, alleges the illegitimacy of the contestant, the determination of such contestant's right is the initial inquiry, separate from and preliminary to the contest itself. *Napier v. Church*, 111.

4. *Counties. Purchase by county. Injunction. Bill.*

The averment of the unverified bill to enjoin a county from buying land that too much is being paid for it, and that complainant believes and alleges that the county is being burdened with \$50,000 more than the land is worth, this going as a profit to promoters, is insufficient as an attack on the purchase, authorized by the legislature at the price attacked. *Heiskell v. Knox County*, 180.

5. *Equity. Cross-bill. Service. Persons on whom service may be made.*

Where, in a suit by a nonresident, defendant files a cross-bill presenting matters not available in an answer, service or proc-

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

ess thereon may be had on complainant's solicitor of record. *Essenkay Co. v. Essenkay Sales Co.*, 287.

6. *Equity. Issues. Service of process.*

The court, refusing to make an order for service of process on nonresident complainant on defendant filing a cross-bill, may not proceed to dispose of the matters involved in the cross-bill setting forth matters which could not properly appear in an answer. *Ib.*

7. *Bills and notes. Amendment. Allowance.*

In a bank's suit on a note defended on the ground of want of consideration, as it originated in fraud practiced by the bank's cashier upon the defendant maker, where the affidavit for the filing of an amended answer, differing from the original answer merely in the evidentiary facts stated as proof of want of consideration, justified the mistake in the original answer on the ground that counsel representing the defendant, a nonresident, had acted on certain memoranda found among the papers of defendant's first attorney, who had died, such affidavit was a sufficient reason for the allowance of the amendment. *Trust Co. v. McDougald*, 323.

8. *Bills and notes. Amendments. Allowance.*

In a bank's action on a note, where the bank was familiar with the fraudulent transactions of its cashier in which the note originated, and the defendant was completely in the dark as to the details, the allowance of an amended answer differing from the original answer merely in the evidentiary facts which it stated as proof of lack of consideration for the note was proper. *Ib.*

9. *Evidence. Admissions. Depositions.*

A deposition of a party was admissible against him, in a proceeding other than that in which it was taken, as an admission under oath. *State ex rel. v. Howse*, 452.

10. *Certiorari. Review. Questions presented.*

Where a judgment for plaintiff was reversed by the court of civil appeals, and the defendant did not by its own petition and assignment of error present for review by the supreme court the holding that the denial of its motion for a peremptory instruction was not error, the question is not open to review on *certiorari* brought by plaintiff. *C. N. O. & T. P. R. Co. v. Brock*, 477.

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

11. *Husband and wife. Action by married woman. Parties. Joinder of husband.*

In a married woman's action for injuries received in an automobile accident, which occurred after the passage of Married Women's Act, February 20, 1913 (Acts 1913, ch. 26), by which married women are given the right to sue in their own names, the joinder of the husband as a party plaintiff was unnecessary. *Knoxville Ry. & Light Co. v. Vangilder*, 487.

12. *Executors and administrators. Sale of land. Sufficiency of complaint.*

Where the petition for an administrator's sale did not set out the individual debts and the names of the creditors, the insufficiency was waived by failure to make objection. *Puckett v. Wynns*, 513.

13. *Officers. Action for salary. Evidence. Right to office.*

In a suit against a county for salary due the clerk of the board of road commissioners, plaintiff might show that the person who had been nominally elected as his successor, and who had given bond and taken the oath of office was a defaulter, and hence not a *de jure* officer, but only a *de facto* officer. *Hogan v. Hamilton Co.*, 554.

14. *Justices of the peace. Warrant. Sufficiency.*

In a suit against a railroad for personal injury on or near its tracks, begun before a justice of the peace, the warrant must sufficiently advise the defendant of the nature of the suit. *Whittaker v. Railroad*, 576.

15. *Railroads. Accident at crossing. Obstruction.*

A count, in an action for personal injury, under Shannon's Code, sec. 1574, subsec. 4, providing that every railroad shall keep the engineer or fireman always upon the lookout, and when any obstruction appears the whistle shall be sounded, the brakes put down, and all possible means taken to prevent an accident, is a count under the common law, unless it was further charged that the person or object on the track was struck by the train, and by the addition of such circumstance the count is brought within Shannon's Code, sec. 1575, providing that every railroad failing to observe specified precautions shall be responsible for all resulting damage to persons or property, and section 1576, providing that no railroad observing such precautions shall be responsible for injury to persons on its road, so that where the

PRINCIPAL AND AGENT.

PLEADING AND PRACTICE—Continued.

warrant did not charge that the train struck the plaintiff or her wagon, and it appeared that she jumped from the wagon, the action was under the common law, and there was no absolute liability for failure to take the specified precautions. *Whittaker v. Railroad*, 576.

16. *Process. Summons. Amendment. Statutes.*

Under Shannon's Code, sec. 4495, providing that new plaintiffs or defendants may be added to the suit by plaintiff upon supplemental process taken out and served, and section 4589, included in the same act, providing that the court may strike out and insert in the writ or pleadings the names of others as plaintiffs or defendants, process to bring in defendant after an amendment substituting plaintiff as administrator, instead of plaintiff in his own name, was not required, and a notification by the court's order, in place of formal process, was sufficient. *Studer v. Roberts*, 599.

17. *Ne exeat. Writ.*

A bill, praying the issuance of a writ of *ne exeat*, must by positive allegations or by facts showing the intention, set forth defendants' intended departure from the State and the probability of loss of rights. *Caughron v. Stinespring*, 636.

18. *Objections. Cure. Pleading of adverse party. Statutes of other states.*

Although it is necessary to plead and prove the statutes of a foreign State in order to recover under them, plaintiff is relieved from doing so, if defendant pleads them and agrees that they control, since the defendant is thereby estopped from controverting them. *Sullivan v. Farnsworth*, 691.

PRINCIPAL AND AGENT.

Authority of agent. Warranties.

An agent, empowered to sell personal property, has implied power to make such warranties as the law would imply, had the same been made by the principal direct, and as are usual in sales of like property. But an agent, authorized to sell a motor truck, has no implied authority to warrant that the tires would last a given length of time while carrying an excess load; such warranties not being usual. *Nixon Mining Drill Co. v. Burk*, 481.

POISONS—POSSESSION.

POISONS.

Food. Poisonous substances. Contributory negligence.

A consumer was not negligent for failure to examine a bottle of tonic for poisonous substances, where it was sealed when bought from the dealer to whom the bottling works had sold it, especially where the bottle and the fluid were both dark in color, and the poisonous substance, a cigar stub, could not have been readily discerned. *Boyd v. Bottling Works*, 23.

POSSESSION.

1. *Adverse. Requisites. Inclosure.*

The inclosure of property is not necessary to establish adverse possession, where such inclosure is impracticable, but possession of such property may be established by such use and occupation as its nature and character admits. *Bensdorff v. Uihlein*, 193.

2. *Adverse. Inclosure. Lot. "Susceptible." "Possible."*

A small triangular lot between two streets and a store, which is principally valuable as a means of access to the store, is not susceptible of inclosure so as to require it to be inclosed in order to support a claim of adverse possession thereto by the storekeeper, since to inclose it would destroy its chief value, and "susceptible," in that rule, is not synonymous with "possible." *Ib.*

3. *Adverse. Exclusive. Use by public.*

The fact that the public, with the store owner's permission, used that pavement as a means of passing from one street to the other, does not prevent his possession from being exclusive, since such use was different in character from that to which he devoted the premises. *Ib.*

4. *Adverse. Elements. Presumptions.*

The adverse nature of possession must be shown by clear and positive proof, and not by inference; every presumption being in favor of a possession in subordination to the title of the true owner. *Drewery v. Nelms*, 254.

5. *Tenancy in common. Adverse. Hostile character.*

The ouster and exclusion of cotenants sufficient to establish adverse possession may be effected by taking possession and giving actual notice of a claim of sole ownership, or by other

POWERS OF COURTS.

POSSESSION—Continued.

positive and unequivocal acts which must, by their nature, put the other cotenants on notice that they are excluded from possession; mere silent, sole occupation by one of the entire property though claiming the whole estate and appropriating all the rents without notice to his cotenants being insufficient. *Drewery v. Nelms*, 254.

6. *Adverse. Use and occupation. Sufficiency.*

The maintaining for more than seven years of a small pen in the woods, about thirty-five by forty feet, which was never cleared or cultivated, being a mere illusory possession, from which the owner might reasonably conclude that there was no intention to claim title, was not such a use and occupation as would give title to a large tract of land under the statute of limitations; it being essential that the use be such as the land is reasonably susceptible of, and that it be obvious, open, and notorious, and indicate an intention to use the land as owner. *Daniel v. Coal & Iron Co.*, 501.

7. *Adverse. Use and occupation. Inclosure.*

Title in defendant by adverse possession could not be predicated on a possession within the boundary of a tract of land owned by defendant and interlapping the land in controversy, where defendant's inclosure was not within the interlap. *Ib.*

8. *Adverse. Possession within interlap. Superior title.*

A possession within such interlap, but on a tract of land to which there was a title superior to that under which plaintiff claimed, could not be adverse to plaintiff's title. *Ib.*

See LANDS AND LAND TITLES.

POWERS OF COURTS.

1. *Contempt. Publications relating to pending litigation.*

It is the inherent right and power of courts to punish for contempt publishers of newspapers who, pending the trial of a case print matter for public circulation which is calculated to impede, embarrass, or affect the orderly trial and disposition of the case being heard. *Tate v. State*, 137.

2. *Contempt. Publications relating to pending litigation. Violation of order.*

The power of the court to punish for contempt one publishing, during the pendency of litigation, matter tending to hinder or

POWERS OF STATE—PROCESS.

POWERS OF COURTS—Continued.

embarrass the court in the discharge of its functions is not dependent upon any preliminary order forbidding such publication being served by the court upon the publisher, since one violating the law becomes amenable to punishment irrespective of previous warning. *Ib.*

POWERS OF STATE.

Descent and distribution. "Inheritance." What law governs, "Natural right."

The State possesses the power to prescribe the laws under which property within the State may descend, and may preclude any other mode or law of descent, and, being the sovereign of the soil, the policy of its laws as to the descent of real property is paramount to that of the legal *status* of persons coming from foreign countries in case of a conflict of laws; "inheritance" not being a "natural or absolute right," but purely a creature of statutory law governed by the *lex rei sitae*. *Cole v. Taylor*, 93.

PRISONS AND PRISONERS.

Liability of superintendent. Torts of assistant.

The superintendent of a county workhouse, under Priv. Acts 1913, ch. 264, creating the office of road commissioners, and providing that one of them should be superintendent of the workhouse and employ its guards with the approval of his associates, was acting in an official or governmental capacity in employing a guard, and, where he was not present when the guard, whom he had told not to shoot any prisoner, shot and wounded a prisoner, attempting to escape, he was not liable in damages. *Lunsford v. Johnston*, 615.

PROCESS.

Summons. Amendment. Statutes.

Under Shannon's Code, sec. 4495, providing that new plaintiffs or defendants may be added to the suit by plaintiff upon supplemental process taken out and served, and section 4589, included in the same act, providing that the court may strike out and insert in the writ or pleadings the names of others as plaintiffs or defendants, process to bring in defendant after an amendment substituting plaintiff as administrator, instead of plaintiff in his own name, was not required, and a notification by the court's order, in place of formal process, was sufficient. *Studer v. Roberts*, 599.

PUBLIC LANDS—RAILROADS.

PUBLIC LANDS.

See LANDS AND LAND TITLES.

PURE FOOD LAW.

1. *Food. Chewing tobacco. Impurities. Manufacturer's liability to consumer.*

Tobacco, even chewing tobacco, is not a foodstuff, within the exception of foodstuffs from the rule that ordinarily the manufacturer of an article placed by him on the market for sale, and sold by another, is not liable to the ultimate consumer for injuries from defects or impurities in it; "food" including only what tends to build bodily tissues. *Liggett & Myers Tobacco Co. v. Cannon*, 419.

2. *Food. Injurious substances.*

The duty of one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous or exercising care to see that nothing unwholesome or injurious is contained in the bottle or package is not in the nature of an implied warranty, and is based upon negligence. *Crigger v. Bottling Co.*, 545.

QUESTIONS FOR JURY.

Railroads. Accident at crossing. Contributory negligence.

In an action for personal injury at a crossing brought under Shannon's Code, sec. 1574, subsec. 4, *held* on the evidence that it was for the jury to say whether plaintiff was negligent in jumping from the wagon instead of trusting her safety to the speed of the horses as the driver of the team did. *Whittaker v. Railroad*, 576.

RAILROADS.

Injuries to persons on tracks. Duty of care. Burden of proof.

Under Shannon's Code, sec. 1574, subd. 4, declaring that every railroad company shall keep a lookout, and, when any person or other obstruction appears on the track, take all means to prevent an accident, and section 1576, declaring that no railroad company that observes such precautions shall be responsible for damage done to persons on its road, one suing for the death of her intestate, killed on defendant's road, has the burden of showing that such intestate was on or so near the track as to be an obstruction before the railroad company is bound to show that it observed the statutory precautions. *C., N. O. & T. P. R. Co. v. Brock*, 477.

RAPE—RECOVERY.

RAPE.

Evidence. Admissibility.

In a prosecution for rape, evidence of other acts of intercourse between the prosecutrix and other men is admissible, not only on the question of the prosecutrix's credibility, but on the probability of consent. *Lee v. State*, 655.

RECOVERY.

1. *Corporations. Directors. Nature of relation. Purchase of stock.*

Directors may purchase stock from stockholders in a corporation, and do not, in making such purchases, occupy a fiduciary relation; hence, where there was no fraud or concealment, the stockholders cannot recover, though they sold their shares at much less than their actual value. *Shaw v. Cole Mfg. Co.*, 210.

2. *Damages. Property. Loss of use.*

Where a motor car was injured through defendant's fault, the owner cannot, as damages for loss of use, recover the rental from week to week for a car, but should recover only the aggregate rental of a machine for a similar time. *Perkins v. Brown*, 294.

3. *Negligence. Imputed negligence. Automobile accident. Husband and Wife.*

The negligence of the driver of an automobile, in consequence of which the machine ran into an obstruction negligently left at the roadside by defendant, was not imputable to his wife, who was riding with him, so as to bar her right to recover for her own injuries, where it did not appear that the danger was obvious or known to her, and that she did not rely on the assumption that her husband would exercise care and caution. *Knoxville Ry. & Light Co. v. Vangilder*, 487.

4. *Vendor and purchaser. Deficiency. Liability for.*

Though purchasers of land visited the property itself and looked over the boundaries, the fact that they did not discover a deficiency of fifty-seven acres will not excuse the vendors, as the purchaser could hardly be expected to discover a shortage in a tract of six hundred acres. *Caughron v. Stinespring*, 636.

5. *Vendor and purchaser. Deficiencies.*

Where a sale is in gross, no compensation will be granted for a deficiency, unless the deficiency is so great as to justify a conclusion of fraud or mistake equivalent to fraud, but if the sale is by the acre, the purchaser may recover for a deficiency at the agreed price per acre. *Ib.*

REMARKS OF COUNSEL—SCHOOL DISTRICTS.

REMARKS OF COUNSEL.

Criminal law. Trial. Conduct of counsel. Threats.

A statement of the prosecuting attorney that "if any one should run over a six years old child of his, he would take a cannon and shoot him," is improper, as calculated improperly to influence the jury. *Lauterbach v. State*, 603.

SALES.

1. *Frauds, statute of. Parol sale. Renunciation. Ejectment.*

The action of the vendor's heirs in bringing ejectment for the land is a sufficient renunciation of a parol voidable sale thereof. *Daniel v. Coal & Iron Co.*, 501.

2. *Executors and administrators. Preliminaries.*

Failure to make a report to the clerk of the court of an administrator's sale to pay debts did not invalidate the sale, since it must be assumed that the court had necessary proofs to establish the facts set forth in the decree of sale. *Puckett v. Wynns*, 513.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Consolidation of schools. Discretion of officers. Statute.*

Under Acts 1913, ch. 4, providing generally for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, the consolidation of schools is not required, but is merely permitted, and the question how the law shall be administered in such respect is left to the discretion of the county board of education. *Cross v. Fisher*, 31.

2. *Transportation of pupils. Statute. Constitutionality.*

Acts 1913, ch. 4, sec. 2, providing for the transportation of children residing too far from a school to attend otherwise, if there are enough children so situated, though vesting a discretion in school boards to discriminate reasonably between pupils living in sufficient numbers at a distance from a school to need transportation, and those so living in insufficient numbers, is not violative of Const. art. 11, sec. 12, setting apart the interest on the common school fund for the equal benefit of all the people, since such section must be construed with section 8 of the same article, providing that the legislature shall not pass any law for the benefit of individuals inconsistent with the general law of the land, nor any law granting to any individual rights or exemptions other than such as may be extended by the same law to

SERVICE.

SCHOOLS AND SCHOOL DISTRICTS—Continued.

any member of the community who can bring himself within the law, for while, by necessity, children of some citizens resident at a distance from the schools may be deprived of the transportation extended to others, nevertheless such citizens can bring themselves within the law by changing residence. *Ib.*

3. *Consolidation of schools. Discretion of board. Abuse. Remedy.*

If a county board of education, acting under Acts 1913, ch. 4, providing for the consolidation of schools, the public transportation of pupils, and the employment of supervisors, in consolidating certain schools into one had ignored all reasonable rules, acting in an arbitrary manner, so as to abuse its discretion, by disregarding the wishes, welfare, and interests of the taxpayers of the district, the action of the officials would have been proper subject for correction by injunction because of abuse of power. *Ib.*

4. *Officers. Constitutional and statutory provisions. "County officers." "Employee."*

Acts 1913, ch. 4, sec. 3, giving boards of education authority to employ supervisors of schools, whose duty shall be to assist county superintendents in the organization, gradation, and supervision of schools, etc., and to pay them out of the respective school funds of counties, etc., does not violate Const., art. 11, sec. 17, providing that no county office created by the legislature shall be filled otherwise than by the people or the county courts, since the appointees contemplated by the act are not "county officers," but mere "employees." *Ib.*

SERVICE. . .

1. *Equity. Cross-bill. Persons on whom service may be made.*

Where, in a suit by a nonresident, defendant files a cross-bill presenting matters not available in an answer, service of process thereon may be had on complainant's solicitor of record. *Essenkay Co. v. Essenkay Co.*, 287.

2. *Equity. Cross-bill. Application for service. Grounds.*

A defendant, filing a cross-bill against a nonresident complainant, is entitled to an order for service of process on complainant's solicitor of record, though in making application defendant erroneously relies on Acts 1887, ch. 226, inapplicable to the case *Ib.*

SOLICITORS—SPECIAL COMMISSIONERS.

SOLICITORS.

Licenses. Merchants. Persons liable.

One who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money and delivering no goods, is a mere "solicitor," and not liable for a merchant's license fee. *Lowenthal v. Underdown*, 559.

SPECIAL COMMISSIONERS.

1. *Equity. Powers of. Loan of money. Compliance with order.*

Where the court ordered that a special commissioner should "for the present lend out all of the funds now in his hands in this cause," such commissioner had no authority to loan moneys collected subsequently to the orders. *State v. Fidelity & Deposit Co.*, 303.

2. *Equity. Unauthorized loan. Adjudication of validity. Confirmation of report.*

Where a special commissioner made two unauthorized loans, and thereafter made a full report of the transactions of his office to the court, listing the notes which he had taken for such loans, and turning them in, whereupon his report was confirmed, his successor appointed, and himself discharged as commissioner, no objection being raised that the loans were unauthorized until the State sued to enforce the commissioner's and his sureties' liability on two official bonds for his breach of duty, the confirmation of the commissioner's report by the court was not an adjudication that he was authorized to lend the money, since there can be no adjudication without an issue. *Ib.*

3. *Equity. Unauthorized loan. Confirmation by court. Waiver of irregularity.*

Under such facts a waiver of the irregularity of the commissioner's action in lending could not be charged against the court, as a waiver cannot result from mere inaction. *Ib.*

4. *Equity. Unauthorized loan. Condonation of irregularity.*

Such circumstances did not amount to a condonation of the commissioner's wrongful act in making the loans. *Ib.*

5. *Equity. Unauthorized loans of funds of wards. Consent of guardian.*

Where the guardian of minors, owners of the fund which a special commissioner lent without authority of the court, consented to the loans, such unauthorized action of the commissioner

SPECIAL COMMISSIONERS.

SPECIAL COMMISSIONERS—Continued.

was not validated by the consent to free him and his surety from liability on his bond, since the fund was not under the guardian's control, but under that of the court, whose authorization of the loans was essential to their validity. *Ib.*

6. *Equity. Loans. Compliance with order.*

Where the court, in authorizing a special commissioner to loan funds in his custody, decreed that he should take for the note of the borrower with two good and solvent sureties thereon, or good collaterals, such sureties or collaterals to be approved by the court, and the commissioner took but one surety, whose name was not submitted to the court, and who was not approved, and took no collaterals, there was a breach of duty on the part of the commissioner subjecting him and his surety to liability on his bond. *Ib.*

7. *Equity. Loan. Order of court. Duty of compliance.*

Where, previous to loaning funds in his custody by authority of the court, a special commissioner did not read the order directing the loan, and that the securities be reported, but supposed that it was in the usual form, permitting him to approve the securities for the loans, his lack of knowledge of the contents of the order could not excuse his failure to comply therewith, nor was the failure of the solicitor for the complainants to mention to him the special direction of the order, when notifying him of it, any excuse, since it was the duty of the commissioner to read the order to ascertain his authority. *Ib.*

8. *Equity. Liability for improper loan. Excuses.*

Where a special commissioner, in loaning funds by order of the court, failed to comply therewith as to the number of sureties he should take, his honesty and sincerity could not excuse his dereliction, since, if he knew the terms of the order, and had doubt as to its meaning, he should have applied to the court for instructions, while, if he failed to examine the order, and had no knowledge of its terms, he had to bear the consequences of his negligence. *Ib.*

9. *Equity. Surety. Liability.*

Where a special commissioner's bond was conditioned that he should well and faithfully discharge his duties as commissioner, and he made full report of his commissionership, listing notes which he had taken when lending funds in his custody, either wholly without authority or on terms not authorized by the

STATUTES AND STATUTORY CONSTRUCTION.

SPECIAL COMMISSIONERS—Continued.

court, which report was confirmed, such settlement of the commissioner was not a performance of every duty which the surety on his bond had obligated himself to secure, since a loan of money by the commissioner without authority was a failure to discharge the duty incumbent upon him to hold the funds until otherwise ordered by the court, while, if the loan was on terms other than those ordered, he likewise failed to discharge his duties. *State v. Fidelity & Deposit Co.*, 303.

STATUTES AND STATUTORY CONSTRUCTION.

1. *Bills and subject. County roads.*

Priv. Acts 1915, ch. 117, sec. 23, in part fixing and defining the powers, duties, and responsibilities of the good roads commission, created by the act for Knox county, falls under, and is expressed by, the part of the title, "To create a good roads commission for said county, and fix and define its powers, duties, and responsibilities," within Const. art. 2, sec. 17, requiring a statute to have only the subject which shall be expressed in the title. *Todtenhausen v. Knox County*, 169.

2. *Certainty. Road commissioners.*

There is no fatal uncertainty in Priv. Acts 1915, ch. 117, sec. 23, when considered with the rest of the act, as to when the good roads commission, created for Knox county, shall take control, and when the regular road commission shall resume control, it being clear the good roads commission is to take control of the roads it may elect to build or repair when the funds have been provided by sale of the bonds, and in its proper discretion the time has arrived for it to assume control, and that when its work is completed the regular road commission shall resume control. *Ib.*

3. *Constitutional law. Construction to sustain validity.*

In cases of doubt, the court will give that construction to an act which will sustain its validity and constitutionality, instead of destroying it, when that can reasonably be done. *State v. White*, 203.

4. *Jury. Right to jury. Assessment of punishment. "Court."*

In Acts 1905, ch. 422, sec. 1, punishing sales of liquor near a schoolhouse by a fine of not less than \$10 or more than \$100, at the discretion of the court, the word "court" includes both court and jury, so that provision for fine for as much as \$100

STATUTES AND STATUTORY CONSTRUCTION.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

does not violate Const. art. 6, sec. 14, requiring fine of more than \$50 to be assessed by jury. *Ib.*

5. *Equity. Special commissioners. Liability on bond. Identity with that of clerk and master.*

Shannon's Code, sec. 402, provides that every clerk of court shall enter into bond for \$10,000 for the faithful discharge of his duties. Section 403 directs that a bond shall be executed for \$5000 conditioned to account for all sums arising from taxes on suits, etc. Section 404 provides that the courts may also require their clerks to give bond to cover property which may come to their hands as special commissioners. Section 405 provides that the failure of the clerk to execute the special bond provided for by section 404 shall not subject him to any penalty, but the court may confide the particular business to others who will give the required security, and, in the absence of such special bond, the clerk and his sureties will be liable on the clerk's regular official bond for all property with which such clerk may be chargeable as special commissioner. A commissioner, who was also clerk and master, made his settlement as clerk, and he and his sureties were thereafter discharged from liability on his bond as clerk and master. Thereafter, acting as commissioner, he made an unauthorized loan of funds in his hands, and in the State's suit to enforce his bond the surety contended that the office of special commissioner was an integral part of that of clerk and master, and that when such commissioner ceased to be clerk he likewise ceased to be commissioner, so that the surety company was not bound for his future acts, and was not liable for the loans he made after his settlement. Laws 1852, ch. 164, not included in the Code, made the office of commissioner a part of the office of clerk. *Held*, that, while the statutes in a certain sense annexed the office of special commissioner to that of clerk, since they entitled the clerk to perform the duties of the office of commissioner and to receive its emoluments if he would execute a special bond under section 404, Shannon's Code, nevertheless there was no merger of the two offices, and, the duration of the appointment of a special commissioner not being limited by law, it might continue beyond the term of office of clerk if a successor to the commissionership were not appointed by the court when the individual ceased to be clerk. *State v. Fidelity & Deposit Co.*, 303.

STOCK AND STOCKHOLDERS.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

6. *Intoxicating liquors. Criminal offenses. Place of sale.*

Acts 1899, ch. 161, provides that any person selling intoxicating liquors without a license shall be guilty of a misdemeanor. Shannon's Code, secs. 6783, provides that the article as to selling liquors is to be construed liberally to prevent evasions and effectuate the objects had in view. *Held*, that where a person went upon a steamboat on the Mississippi river for the purpose of purchasing, and was received on the boat by those operating it for the purpose of selling him, intoxicating liquors, and the boat thereupon ran into the river across the State line, and after a sale of liquor was made by its barkeeper looped back to the Tennessee shore and landed the purchaser near the point from which he started, the barkeeper was guilty of a violation of the statute. *Kinnane v. State*, 331.

7. *Title. Sufficiency.*

The title of Acts 1913, ch. 26, entitled "An act to remove the disabilities of coverture from married women and to repeal all acts and parts of acts in conflict with the provisions of this Act," is sufficient, within Const., article 2, section 17, declaring that no bill shall embrace more than one subject, to be expressed in the title, to justify provisions in the body to the act abrogating the common-law disabilities of married women, and declaring that every married woman shall have the same capacity to acquire, control, enjoy, and dispose of all property, to make any contract in reference to it, and to bind herself personally, as if unmarried. *Parlow v. Turner*, 339.

8. *Construction. Exceptions.*

Where a general rule has been established by statute, with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumerations weaken it as to things not expressed. *Burns v. City of Nashville*, 429.

STOCK AND STOCKHOLDERS.

1. *Corporations. Directors. Nature of relation. Purchase of stock.*

Directors may purchase stock from stockholders in a corporation, and do not, in making such purchases, occupy a fiduciary relation; hence, where there was no fraud or concealment, the stockholders cannot recover, though they sold their shares at much less than their actual value. *Shaw v. Cole Mfg. Co.*, 210.

SUPREME COURT.

STOCK AND STOCKHOLDERS—Continued.

2. *Corporations. Liability. Interest.*

The holder of corporate stock is liable for the unpaid balance thereon from the time he receives the stock; and hence the receiver, suing to recover such balance, may recover interest from the date of subscription, although he is not liable for interest where such principal liability is penal. *Sullivan v. Parnsworth*, 691.

SUPREME COURT.

1. *Criminal law. Appeal. Procedure. Rights of accused.*

Const., art. 1, sec. 17, guaranteeing due course of law, gives to accused the right to present his case to the supreme court on appeal or writ of error either in person or by counsel, and the court will seldom deny accused's request for permission to be personally present and to address the court with his counsel, but the court will not permit him to be without counsel, and will appoint one to appear for him, though accused appears and argues the case in person. *Vowell v. State*, 349.

2. *Certiorari. Jurisdiction.*

Under Acts 1907, ch. 82, sec. 8, providing for the review by the supreme court upon *certiorari* of the cases appealed to the court of civil appeals, the supreme court can take jurisdiction of such cases only through the writ of *certiorari*, and only after final decree or judgment in the court of civil appeals, and is without power to review the interlocutory orders of that court or its judges in matters within its jurisdiction. *Burns v. City of Nashville*, 429.

3. *Courts. Review of acts of court of civil appeals and judges thereof.*

Acts 1907, ch. 82, sec. 8, providing that in all cases within the final jurisdiction of the court of civil appeals the decrees and judgments of such court shall be final, and shall not be reviewed by the supreme court save as therein provided, does not apply to cases outside the jurisdiction of the court of civil appeals, and when that court or one of its judges mistakenly assumes jurisdiction the supreme court is not limited to the method prescribed in that act for removing cases from the court of civil appeals for review. *State ex rel. v. Alexander*, 439.

See CERTIORARI; JURISDICTION. .

SURETY AND SURETYSHIP—TENANTS IN COMMON.

SURETY AND SURETYSHIP.

Equity. Liability of surety on bond. Order of court on settlement. Statutes.

Where the surety on the bond of a clerk of court, which Shannon's Code, sec. 405, provided should secure the performance of such clerk's duties as special commissioner in the absence of a special bond for that purpose, was sued for a default of such clerk as commissioner after his term as clerk had expired, and the court had made an order releasing him from liability on his "bonds," the surety's contention that the order released the clerk from his bond and liability as special commissioner, so that the surety was not liable for his defaults as such, was untenable, since the order referred only to the bonds required by sections 402 and 403 of a clerk, as such, his official bond, and his revenue bond. *State v. Fidelity & Deposit Co.*, 303.

TENANCY.

Life estates. Lessees of life tenant. Rights of.

Under Shannon's Code, sec. 4184, providing that, where a life tenant shall lease the estate and die before expiration of the lease the rent may be apportioned between his representative and the remainderman, a life tenant cannot create a lease on land which will extend beyond the life estate, the remainderman not joining; for the remainderman is entitled to share in the rental *sum pro tanto* under the statute or to disaffirm. *Turner v. Turner*, 592.

TENANTS IN COMMON.

1. *Purchase by. Effect.*

A tenant in common cannot, as a general rule, purchase the common property at a tax or foreclosure sale, or purchase an outstanding title, except for the benefit of all the tenants. *Davis v. Solari*, 225.

2. *Partition. Order of sale. Purchase by. Validity.*

Under Shannon's Code, sections 5010, 5025, 5040, 5042, 5051, 5052, 5915, authorizing partition and the settlement by decree of the rights of the parties, and providing that a confirmation of sale divests title, a tenant in common filing a petition to sell for partition may purchase the property at a sale ordered by the court, in the absence of any fraud. *Ib.*

3. *Hostile character of possession. Presumptions.*

In adverse possession, the possession of one tenant in common is the possession of all, and his entry and holding will continue

TORTS—U. S. CONSTITUTION.

TENANTS IN COMMON—Continued.

as the possession of all, and to overturn this entirety of possession, there must be some plain demonstration that he has repudiated the rights of his cotenants. *Drewery v. Nelms*, 254.

4. Adverse possession. Presumption of grant.

A presumption of title may arise by an exclusive and uninterrupted possession by one tenant in common for twenty or more years, claiming the same as his own, without any recognition of his cotenants or claim upon their part, but such presumption arises independent of the statute of limitations, and may be rebutted by proof of disability on the part of the cotenants. *Ib.*

TORTS.

Injury to business.

In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination. *Hutton v. Watters*, 527.

See DEMURRER.

TRIAL BY JURY.

Jury. Right to jury. "Cases triable by jury."

Acts 1875, ch. 4, as amended by Acts 1889, ch. 220 (Shannon's Code, secs. 4611-4616), providing that in cases "triable by jury" a demand shall be necessary, applies not only to cases where jury trial was permissive, but where it had heretofore been imperative; neither Const., art. 1, sec. 6, declaring that right of trial by jury shall remain inviolate, nor Const. U. S. Amend. 7, declaring that it should be preserved, prohibiting waiver of jury trial. *Ferris v. Bloom*, 466.

UNITED STATES CONSTITUTION CITED AND CONSTRUED.

Amend. 7. Jury. Right to jury. "Cases triable by jury." *Ferris v. Bloom*, 466.

 UNITED STATES CONSTITUTION—WARRANTIES.

UNITED STATES CONSTITUTION.

Constitutional law. Equal protection of law. Slave marriage. Legitimacy of issue.

The court was not forbidden by Const. U. S. Amend. 14, to hold that, for purposes of inheritance, the issue of a slave marriage contracted in Louisiana and there terminated before emancipation, was illegitimate. *Napier v. Church*, 111.

UNITED STATES STATUTES.

Civil rights. Rights protected. Inheritance. Issue of slave marriage. Legitimacy.

The federal Civil Rights Act March 1, 1875, ch. 114, 18 Stat. 335 (U. S. Comp. St. 1913, sec. 3926) does not forbid the Tennessee courts to hold that, for inheritance purposes, the issue of a slave marriage, contracted in Louisiana and terminated there before emancipation, was illegitimate. *Napier v. Church*, 111.

USE AND OCCUPATION.

See POSSESSION.

VERDICTS.

Trial. Taking case from jury. Question of law or fact. Conflicting evidence.

There can be no constitutional exercise of the power to direct a verdict in any case where there is a dispute as to any material evidence or any legal doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried, but the case must go to the jury; but, if there is no such dispute, the question is one of law for the court. *Railroad v. Morgan*, 1.

WARRANTIES.

Principal and agent. Authority of agent.

An agent, empowered to sell personal property, has implied power to make such warranties as the law would imply, had the same been made by the principal direct, and as are usual in sales of like property. But an agent, authorized to sell a motor truck, has no implied authority to warrant that the tires would last a given length of time while carrying an excess load; such warranties not being usual. *Nixon Mining Drill Co. v. Burk*, 481.

WILLS—WITNESSES.

WILLS.

1. *Probate. Legitimacy of contestant.*

Where the proponent of a will, upon petition to contest as heir of decedent, alleges the illegitimacy of the contestant, the determination of such contestant's right is the initial inquiry, separate from and preliminary to the contest itself. *Napier v. Church*, 111.

2. *Estoppel. Provisions of will. Ejectment.*

A provision of a will bequeathing to testator's children "the proceeds of the sale of land in Tennessee lately bought by me that may remain there and uncollected at the time of my decease," and a provision of a codicil stating that "respecting Tennessee lands I refer solely to the unpaid purchase money," were too uncertain to establish a conveyance of the land, or to estop the heirs from asserting title in ejectment, especially where the lands in controversy were bought by testator twenty-four years before execution of the will, and the evidence was not conclusive whether testator owned other lands in Tennessee. *Daniel v. Coal & Iron Co.*, 501.

3. *Ejectment. Right of action. Parties. Power of sale.*

A provision of a will authorizing testator's executors to sell and convey his realty, being but a power of sale, did not vest title in his executors, so as to preclude his heirs from suing to recover the land. *Ib.*

WITNESSES.

1. *Impeachment.*

In action for the death of plaintiff's husband and for injury to other plaintiffs from being struck by defendant's engine, where a witness for plaintiff testified that the defendant's fireman was a man of bad character when he lived in witness' neighborhood twelve or thirteen years before the trial, a letter written by the witness certifying that the fireman had been a quiet, peaceable boy was admissible to discredit the witness. *Railroad v. Morgan*, 1.

2. *Conduct of trial. Cross-examination by trial judge.*

In a criminal prosecution the action of the court in not permitting counsel for the State to cross-examine defendant and in undertaking to do so himself, framing exceedingly sharp questions, and, after defendant's own counsel had had defendant for a short time, in resuming cross-examination which totaled one-third of the defendant's personal testimony, was reversible error. *Parker v. State*, 327.

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